DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-820
Title: Manuel Jose Lozano, Petitioner
v.
Diana Lucia Montoya Alvarez
Docketed: January 4, 2013
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (11-2224)
Decision Date: October 1, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 2 2013	Petition for a writ of certiorari filed. (Response due February 4, 2013)
Feb 4 2013	Brief of respondent Diana Lucia Montoya Alvarez in opposition filed.
Feb 14 2013	Reply of petitioner Manuel Jose Lozano filed.
Feb 20 2013	DISTRIBUTED for Conference of March 15, 2013.
Mar 18 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 24 2013	Brief amicus curiae of United States filed.
Jun 4 2013	Supplemental brief of petitioner Manuel Jose Lozano filed.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Petition GRANTED limited to Question 1 presented by the petition.
Jul 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 30, 2013.
Jul 12 2013	The time to file respondent's brief on the merits is extended to and including October 22, 2013.
Aug 28 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 30 2013	Joint appendix filed. (Statement of costs filed)
Aug 30 2013	Brief of petitioner Manuel Jose Lozano filed.
Sep 4 2013	Brief amicus curiae of Mexican Association for Abducted and Missing Children in support of neither party filed.
Sep 5 2013	Brief amici curiae of International Academy of Matrimonial Lawyers (IAML) filed. (Distributed)
Sep 6 2013	Brief amicus curiae of Reunite International Child Abduction Centre in support of neither party filed.
Sep 6 2013	Brief amicus curiae of National Center for Missing and Exploited Children filed.
Sep 6 2013	Brief amici curiae of A Child Is Missing, Inc., et al. filed.

Sep 11 2013	SET FOR ARGUMENT ON Wednesday December 11, 2013.
Sep 17 2013	CIRCULATED
Oct 1 2013	Record received from U.S.C.A. for the Second Circuit - 1 envelope.
Oct 1 2013	Additonal record received from the U.S.C.A. Second Circuit. (1 envelope containing SEALED documents.
Oct 22 2013	Brief of respondent Diana Lucia Montoya Alvarez filed. (Distributed)
Oct 29 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 29 2013	Brief amicus curiae of United States filed. (Distributed)
Oct 29 2013	Brief amici curiae of Domestic Violence Legal Empowerment & Appeals Project (DV LEAP), et al. filed. (Distributed)
Nov 15 2013	Record from U.S.D.C. for Southern District of California is electronic.
Nov 18 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 21 2013	Reply of petitioner Manuel Jose Lozano filed. (Distributed)
Nov 22 2013	Record received from the U.S.D.C. Southern District of New York.
Dec 11 2013	Argued. For petitioner: Shawn P. Regan, New York, N. Y. For respondent: Lauren A. Moskowitz, New York, N. Y.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 12-620

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The primary purpose of The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") is to protect children from international abduction by returning an abducted child to the nation of habitual residence for adjudication of custody rights under that nation's laws. To further that purpose, Article 12 of the Convention mandates that an abducted child *must* be returned if the left-behind parent's petition for the child's return is filed within one year of the abduction. In doing so, the Convention deters international child abductions by removing the benefit an abducting parent would otherwise obtain or perceive under the laws of the nation to which he or she has abducted the child. If the left-behind parent is unable, or otherwise fails, to determine the situs of the child and meet this one-year filing deadline, the court must still order the return of the child unless the abducting parent demonstrates one of four affirmative defenses, including that the child is "settled" in her new environment.

The circuit courts of appeal are split over whether equitable tolling may apply to the one-year period. While the Fifth, Ninth, and Eleventh Circuits all hold the one-year period may be equitably tolled, the Second Circuit held in this case that the one-year period is not subject to equitable tolling and the settled defense is still available even where, as here, the abducting parent conceals the location of the child. The Second Circuit also held the fact that the child and abducting parent lack legal immigration status is not dispositive on the issue of whether a child is settled under Article 12, but, rather, is merely

one of several factors to consider. The questions presented are:

1. Whether a district court considering a petition under the Hague Convention for the return of an abducted child may equitably toll the running of the one-year filing period when the abducting parent has concealed the whereabouts of the child from the left-behind parent.

2. Whether an abducted child can be "settled" in the United States, within the meaning of Article 12, where it is undisputed that both the abducting parent and the child are residing illegally in the United States, and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.

PARTIES TO THE PROCEEDINGS

Petitioner, Manuel Jose Lozano, was the appellant in the court below.

Respondent, Diana Lucia Montoya Alvarez, was the appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Manuel Jose Lozano respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 697 F.3d 41, and reproduced at Petition Appendix ("Pet. App.") 1a. The underlying final order of the Second Circuit is not reported and is included in the Appendix. The opinion of the United States District Court for the Southern District of New York is published at 809 F. Supp. 2d 197, and reproduced at Pet. App. 39a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 1, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Clause 1 of the United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.

§ 11601–11610 (2005), are reproduced at Pet. App. 117a.

Relevant provisions of the Hague Convention are reproduced at Pet. App. 129a.

INTRODUCTION

The primary purpose of the Hague Convention is to protect children from international abduction by providing a procedure to return an abducted child to the nation of habitual residence for adjudication of custody rights under that nation's laws.

Abducting parents should not be allowed to thwart this purpose by concealing the whereabouts of the abducted child. Allowing district courts to equitably toll the one-year filing period in cases where an abducted child's whereabouts have been concealed advances the Hague Convention's purpose by eliminating the practical and juridical benefit of abducting and concealing children, and by facilitating the return of abducted children to their home countries. By ruling that equitable tolling cannot be applied to the one-year filing period, the Second Circuit undercuts a significant deterrent that the majority of federal courts—including the Fifth, Ninth, and Eleventh Circuits—recognize as vital to achieve the purpose of the Hague Convention. The Second Circuit's holding that district courts may not toll the one-year filing period even in cases where, as here, the abducting parent conceals the child's whereabouts rewards the abducting parent by allowing her to raise defenses to the left-behind parent's petition that otherwise would not be available. And the decision allows an abducting parent to eviscerate by his or her wrongful conduct the protection Article 12's one-year standard provides

to the left-behind parent, who is constrained from taking action due to, on one hand, a lack of knowledge as to where to file properly and, on the other hand, procedural strictures like Rule 11(b) that preclude the left-behind parent from filing claims without a proper evidentiary basis in fact. As a result, the Second Circuit's decision will encourage other abducting parents to conceal their children's whereabouts in order to delay for as long as possible the filing of a Hague Convention petition in the country to which the child has been taken. In turn, it punishes left-behind parents by placing the burden on them to speculate, for purposes of filing a Hague Convention petition within the one-year filing period, whether their abducted children have been taken from the country, and to where.

The Second Circuit's decision goes one step further in undermining the fundamental purpose of the treaty. The Second Circuit ruled that an abducted child's illegal immigration status does not preclude a finding that the child is "settled" within the meaning of Article 12 even when the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in status. In effect, the court's treatment of the abducted child's illegal immigration status shields abducting parents from the consequences of their wrongdoing and encourages them to take their abducted children to live illegally in the United States. This Court's review of the Second Circuit's decision is clearly warranted.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

Manuel Jose Lozano and Diana Lucia Montoya Alvarez, both of whom immigrated to England from Colombia, met and began dating in London in 2004. They soon began cohabitating, although they never married. On October 21, 2005, Diana gave birth to the couple's daughter. For more than three years, Manuel, Diana, and their daughter lived together in London. On November 19, 2008, Diana abducted the child from the family home, without notice or warning, never to return. Despite his constant and diligent efforts, Manuel has not seen his daughter since.

When Diana failed to return home with the child, Manuel took immediate steps to locate his daughter, but his efforts were frustrated by Diana's willful concealment of the child's whereabouts. On November 22, 2008, three days after Diana had abducted their daughter, Manuel reached Diana by telephone. She refused to disclose their whereabouts and instead claimed falsely to have filed a police report against him and hung up. Shortly thereafter, in December 2008, Manuel reached Diana's sisters in London. The first sister told him not to attempt to contact his daughter or Diana if he did not "want trouble" or "want to be sorry." The second sister told Manuel that Diana and the child were living in a shelter in London. He retained counsel, was unable to locate his daughter, and heard nothing further from them until shortly after March 27, 2009, when Diana's English solicitors sent a letter to Manuel's English counsel stating that Diana would not allow Manuel to have any contact with his daughter. Based on all of these events, particularly his being

contacted by Diana's English solicitors, Manuel reasonably believed that Diana had abducted their daughter to a location somewhere within the United Kingdom.

In fact, Manuel's belief was correct. Diana remained in the United Kingdom for almost eight months after abducting the child, and in May of 2009, applied for permanent public housing in England. Because Diana led Manuel to believe she abducted the child to somewhere within the United Kingdom, all of his diligent efforts to locate his daughter were focused in the United Kingdom. On July 23, 2009, Manuel, through his English solicitors, filed an application under the Children Act of 1989 to obtain "a prohibited steps" order and a "defined contact" order to "ensure that he obtains regular contact with his child." At this time, information indicated that the last known whereabouts of Diana and Manuel's daughter was the Croydon's Women's Shelter in London.

As Manuel continued to search for his daughter within the United Kingdom and made progress on determining her whereabouts, Diana removed their daughter to Paris, France on July 3, 2009 without Manuel's knowledge or consent. On July 8, 2009, Diana took their daughter from France to New York, where they have been living ever since. As of October of 2009, Diana and Manuel's daughter had overstayed their visas and currently reside illegally in the United States.

Meanwhile, Manuel continued to search for his daughter in England because neither he nor his solicitors received any indication from Diana, her solicitors, her family, or any third parties indicating that she had left the United Kingdom. On September

16, 2009, Manuel applied for § 33 Family Law Act of 1986 disclosure orders to be served on Diana's sisters in England, the Metropolitan Police that Diana falsely claimed to have contacted, the Child Benefit Office, Diana's solicitors, his daughter's doctor, and the Croydon's Women's Shelter. Nothing from this first round of disclosure orders gave Manuel any reason to believe Diana was taking the child to the United States or had already done so. The Family Court served another series of disclosure orders, the last of which was returned on February 22, 2010. Only then, after exhausting the British court system, did Manuel and his solicitors conclude that Diana likely had removed the child from the United Kingdom.

On March 15, 2010, Manuel filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom. On March 23, 2010, the International Child Abduction and Contact Unit (the Central Authority for England and Wales) sent that application to the United States Department of State Office of Children's Issues. After several months of searching for pro bono counsel in the United States, the U.S. Department of State located the undersigned counsel to undertake Manuel's cause on July 27, 2010. Only with the assistance of the U.S. Department of State, a private investigator, and retained pro bono counsel was Manuel able to discern the whereabouts of his daughter within the United States.

On November 10, 2010—well within one year of having grounds to reasonably believe that his daughter had been abducted internationally from England, and after (within that same period of less

than a year) having obtained counsel, hired an investigator, and properly determined the jurisdiction within which the child was being held—Manuel filed a Petition for Return of Child pursuant to Article 2 of the Hague Convention and the International Child Abduction Remedies Act, 42 U.S.C. § 11603 (2005) ("ICARA"), in the United States District Court for the Southern District of New York. Manuel's Petition requested an order requiring that the child be returned to London to have a British court determine custody.

II. DECISION OF THE DISTRICT COURT

After a hearing, the District Court held that although Manuel established his prima facie case of wrongful removal under the Hague Convention, Diana proved by a preponderance of the evidence that the child had become settled in her current environment, and that this settled exception was sufficient to not order the child and mother to return to the United Kingdom to determine a proper custody arrangement. The District Court rejected Manuel's tolling argument on the grounds that the one-year filing period is not a statute of limitations and does not bar a petitioner from filing a petition after that period has elapsed. The District Court analyzed the factors that weighed both for and against allowing Diana to retain the child in the United States for a custody determination, and, with regard to the illegal immigration status of both Diana and the child, stated: "There is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and the Respondent is likely to upset the stability of the child's life here in New York."

The District Court rejected Diana's second defense—that returning Manuel's daughter to the United Kingdom would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation.

On May 27, 2011, Manuel filed a timely notice of appeal from the District Court's denial of his petition.

III. THE BRIEF OF THE UNITED STATES

By letter dated July 11, 2012, the Second Circuit requested that the Secretary of State submit her views concerning: (1) whether equitable tolling applies to the one-year period that triggers availability of the "settled" defense under Article 12 of the Hague Convention; and (2) what significance should be given to a child's lack of legal immigration status in the United States when determining whether a child is "settled" within the meaning of Article 12.

On August 20, 2012, the United States submitted a memorandum brief as *amicus curiae* and responded to the Second Circuit's request, in pertinent part, as follows:

> (1) Equitable tolling does not apply to the one-year period under Article 12; instead the court retains equitable discretion to order a child's return at any time. A court may do so even if the child is "now settled." . . . [And] (2) The child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Amicus Br., at 2.

This position reflected a complete reversal of the Government's prior position on equitable tolling.

Prior to the initiation of Manuel's petition, all of the State Department's public statements indicated that abducting parents who conceal their children's whereabouts should not benefit from their wrongdoing.

As far back as 1986, for example, the State Department addressed the one-year filing deadline and stated that

> [t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

See "Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction," 51 Fed. Reg. 10,503 (1986).

And twenty years later, in 2006, the State Department reiterated its support for the application of equitable tolling in Hague Convention cases. In response to a formal Hague Conference questionnaire concerning the practical operation of the Convention, the State Department stated that the U.S. Government

> supports the concept of equitable tolling of the one-year filing deadline in order to

> prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the untimely filing of a Hague petition.

See Hague Conference on Private International Law, "Collated Responses to Questionnaire," at p. 577.

In its *amicus* brief in this case, however, the Government took a 180-degree turn and adopted the position that equitable tolling does not apply to Article 12 because courts retain "equitable discretion" to order a child's return at any time. Ignoring the plain meaning of its own prior statements, the Government asserted that its 2006 statement did not concern equitable tolling at all, but should be "understood in the sense of the availability of the exercise of equitable discretion." *Amicus* Br., at 11, n.11.

Examination of the Questionnaire, however, reveals that the Government plainly endorsed "equitable tolling" and not "equitable discretion" in its answer. In the sentence immediately prior to voicing its support for "the concept of equitable tolling," the Government wrote to "see response to question #13(f), where we discuss *equitable tolling* of the filing deadline under the Convention." *See* "Collated Responses to the Questionnaire," p. 577 (emphasis added). Question 13(f) of this document solicited feedback regarding "important developments" relating to the one-year period under Article 12. *Id.*, at p. 149. In response to this question, the State Department wrote the following with regard to equitable tolling of the one-year filing deadline:

> The U.S. Supreme Court has stated that, unless Congress states otherwise, equitable

> tolling should be read into every federal statute of limitations ... Several courts have held that equitable tolling may be applied to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking the return. The courts reason that if they did not permit equitable tolling, the parent who abducts and conceals children for more than a year will be rewarded for this misconduct by creating eligibility for an affirmative defense not otherwise available. The Eleventh Circuit has held that the one-year limitation period begins on the date the petitioner discovers the new residence of a child whose whereabouts have been concealed by the other parent.

Id., at p. 217. The Government's *amicus* brief did not attempt to explain its change in position. Therefore, the Government's new position does not merit the *Skidmore* deference granted by the Second Circuit. Op. at 19 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

IV. DECISION OF THE SECOND CIRCUIT

The Second Circuit affirmed the decision of the District Court, holding that (1) district courts lack authority to equitably toll Article 12's one-year filing period prior to which an abducted child must be ordered returned, and (2) illegal immigration status does not, standing alone, preclude a court from finding a child is "settled" within the meaning of Article 12.

The court reasoned that the one-year filing period in Article 12 does not operate as a statute of

limitations because a court retains discretion under Article 18 of the Convention to order a child's return at any time, i.e., even if the child is found to be settled in his or her new environment. Op. at 14. The court found equitable tolling to be an "unnecessary" form of relief because "the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct"—the court's own discretion to order the return of a child, even when a defense is satisfied. Op. at 14.

According to the court's interpretation of the history and purpose of the Article 12 "settled" exception, the one-year filing period was designed to allow courts to consider a child's interests in remaining in the country into which she has been abducted after a certain time has passed. Op. at 18–19. Based upon this finding, the court concluded that equitable tolling was inconsistent with the treaty's purpose. Op. at 19.

REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant the petition for writ of certiorari and review the Second Circuit's decision. First, as the Second Circuit acknowledged, its decision creates a distinct split among the circuit courts of appeal as to whether equitable tolling applies to the one-year filing deadline under Article 12 of the Hague Convention. Second, the Second Circuit's ruling hinges on an additional question concerning the proper interpretation of Article 12 of the Hague Convention that has not been, but should be, resolved by the Supreme Court—namely, whether an abducted child can be "settled" within the meaning of Article 12 where it is undisputed that both the abducting parent and the child are residing illegally in the United

States, and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.

I. THE CIRCUITS ARE SPLIT

A. There Is an Acknowledged Split of Authority Between the Second Circuit and the Fifth, Ninth, and Eleventh Circuits Regarding Whether Courts Can Equitably Toll the One-Year Period Before a Parent Can Assert the Settled Defense.

The Second Circuit is the first and only circuit court of appeals to reach the conclusion that equitable tolling does not apply to Article 12's one-year filing deadline. It did so while recognizing that it was departing from the decisions reached by the Fifth, Ninth, and Eleventh Circuits. Op. at 20. *See Dietz v. Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009); *In re B. Del C.S.B.*, 559 F.3d 999, 1014–15 (9th Cir. 2009); *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004). For the reasons discussed below, the Second Circuit's opinion undermines the purpose of the Hague Convention and should be reversed.

Contrary to the Second Circuit's position, the Ninth and Eleventh Circuits have found equitable tolling of the one-year filing deadline necessary to further the Convention's overarching aim of deterring child abduction. *Duarte*, 526 F.3d at 570; *Furnes*, 362 F.3d at 710, 715. This Court recognizes that the purpose of the Convention is to deter child abduction. *Abbott v. Abbott*, 130 S. Ct. 1983, 1996 (2010) (observing that to "interpret the Convention to permit an abducting

parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would *run counter to the Convention's purpose of deterring child abductions* by parents who attempt to find a friendlier forum for deciding custodial disputes") (emphasis added).

The Eleventh Circuit, which first adopted the principle of equitable tolling in the context of Article 12, holds that equitable tolling may apply to petitions for the return of a child "where the parent removing the child has secreted the child from the parent seeking return." *Furnes*, 362 F.3d at 723. The Ninth Circuit has adopted a similar test, applying equitable tolling when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return. *Duarte*, 526 F.3d at 570.

These courts reasoned that failing to provide for tolling in the face of concealment by the abducting parent not only would encourage child abductions, but also would incentivize an abducting parent to conceal the child. *Furnes*, 362 F.3d at 723 (citing *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362–63 (M.D. Fla. 2002) (holding that equitable tolling applies to ICARA petitions because otherwise "a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available"); *Duarte*, 526 F.3d at 570 (citing *Belay*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) ("[T]o reward the abductor as such would be to condone the exact behavior the Convention seeks to prevent")).

In reaching its conclusion, the Ninth Circuit noted that the Government expressed these same concerns

in the State Department's public notice on the Hague Convention, which states:

> If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

Id. (citing Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494, 10,505 (Dep't of State March 26, 1986) (Pub. Notice)).

In *Duarte*, the Ninth Circuit recognized the serious concerns with uprooting a potentially settled child regardless of whether the abducting parent concealed that child, and that both the Hague Convention and ICARA are silent on whether equitable tolling applies. Nevertheless, the court reasoned that it was necessary to toll the one-year filing deadline through equitable principles in order to further the Convention's goal of deterring child abduction. *Id.*

The Ninth Circuit affirmed the holding of *Duarte* in a subsequent case, stressing the two related conditions that need be met in order for tolling to apply: (1) the abducting parent must have concealed the child from the petitioning parent, and (2) that concealment must have caused the petitioning parent's filing delay. *In re B. Del C.S.B.*, 559 F.3d 999, 1014–15 (9th Cir. 2009).

Contrary to the Second Circuit's assertion that this case "suggests that there may be limits to the *Duarte* holding," *In re B. Del C.S.B.* instead underscores the

Ninth Circuit's cognizance that competing interests need to be balanced carefully under the Convention. *Id.* (observing that the court must "ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions"). The court found that tolling did not apply to the facts of the case because there was no evidence of concealment, and thus the second necessary condition of the *Duarte* test was not met. *Id.* at 1015 (discussing evidence that the left-behind parent knew exactly where his child was, even sending presents to her home address).

The Second Circuit found the decisions of the Ninth and Eleventh Circuits unpersuasive on the ground that those circuits wrongly treated the one-year filing period in Article 12 as a statute of limitations. Op. at 21. But both the Ninth and the Eleventh Circuits explicitly have recognized that the one-year period is not a traditional statute of limitations. The Ninth Circuit observed that the district court below distinguished the one-year period from a statute of limitations, yet nonetheless found the principle applies, not just vaguely as a general matter, but specifically to Article 12:

> As one district court explained, "the evident import of [Article 12's one-year period] is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child."

In re B., 559 F.3d at 1014.

The Eleventh Circuit, in a decision pre-dating *Furnes* that did not directly address equitable tolling

on appeal, noted similar logic in the decision on review:

> The district court first determined that this one-year time limit, which in some respects is similar to a statute of limitations, may be equitably tolled. In doing so, the district court found that it is difficult to "conceive of a time period arising by a federal statute that is so woodenly applied that it is not subject to some tolling, interruption, or suspension, if it is shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period."

Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998).

In fact, this Court's decision in *Young v. United States*, which was cited by both *Duarte* and *Furnes*, supports the argument that equitable tolling applies beyond the context of a traditional statute of limitations. *Duarte*, 526 F.3d at 570 (citing *Young v. United States*, 535 U.S. 43, 43 (2002)); *Furnes*, 362 F.3d at 723 (citing the same). In *Young*, this Court held that a three-year lookback period under the Bankruptcy Code, which affects the dischargeability of certain tax debt,

> is a limitations period subject to equitable tolling principles. It prescribes a period in which certain rights may be enforced . . . Thus, it serves the same basic policies furthered by all limitations periods: repose, elimination of stale claims, and certainty about a plaintiff's opportunity

> for recovery and a defendant's potential liabilities.

Id., 535 U.S. at 43 (2002) (internal quotations omitted).

The one-year filing deadline under Article 12 prescribes periods in which certain rights may be enforced and is intended to provide certainty about the parties' rights and liabilities after one year has elapsed. As with the lookback period in *Young*, equitable tolling of Article 12 prevents abducting parents from taking advantage of a "loophole" created by strict adherence to the time period. *See Young*, 535 U.S. at 46–47 (stating that "[p]etitioners took advantage of [the] loophole" created by the three-year period because the three-year period technically allowed parties to discharge tax debts by filing and then dismissing another bankruptcy proceeding after the three-year period had passed). Moreover, the tests adopted by the Ninth and Eleventh Circuits for applying equitable tolling explicitly recognize that the principle applies only where a petitioner has made diligent efforts to locate his or her child and where extraordinary circumstances—the abduction and concealment of the child—cause a delay in filing. *Cf. Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (holding that a litigant seeking equitable tolling generally bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way).

In addition to the Ninth and Eleventh Circuits, the Fifth Circuit holds that equitable tolling applies to Article 12 of the Convention, having found that a district court did not err in applying equitable tolling to the one-year filing deadline until the date the left-

behind parent definitively located her children. *Dietz v. Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009). The court stated that while both ICARA and the Convention make no mention of equitable tolling, it is well-established in caselaw that it applies. *Id.* (citing *Van Driessche v. Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) (applying equitable tolling where the abducting parent did not reveal her location to the petitioning parent, which could have precluded him from filing his Hague Petition)).

Whether tolling applies to Article 12 is an issue that is ripe for this Court's consideration because it arises in federal and state courts across the nation and has been analyzed by the lower courts for well over a decade. Federal district courts within the jurisdiction of at least ten circuit courts of appeal have directly addressed the issue, and the overwhelming majority of these courts hold that equitable tolling or an analogous equitable principle applies to Article 12, particularly where the abducting parent conceals the child and the concealment causes a delay in filing of the petition for return. *See Sita-Mambwene v. Keeton*, 2009 U.S. Dist. LEXIS 77446 (E.D. Mo. Aug. 29, 2009) (tolling where the abducting parent concealed the child's location); *In re Hague Child Abduction Application*, 2008 WL 913325, at *10 (D. Kan. Mar. 17, 2008) (same); *Wasniewski v. Grzelak*, 2007 U.S. Dist. LEXIS 59762, at *5 (N.D. Ohio Aug. 15, 2007) (same); *Ibarra v. Garcia*, 476 F. Supp. 2d 630 (S.D. Tex. 2007) (same); *In re Giampaolo*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004) (same); *In re Cabrera*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (same); *Belay v. Getachew*, 272 F. Supp. 2d 553, 562–64 (D. Md. 2003) (same); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (same); *Mendez Lynch v. Mendez*

Lynch, 220 F. Supp. 2d 1347, 1362–63 (M.D. Fla. 2002) (same); *see also Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) (finding concealment based largely on the mere fact that the abducting parent did not disclose the child's location to the left-behind parent).

In other cases, courts recognize the applicability of equitable tolling principles to the one-year standard but decline to apply it where the left-behind parent knew the exact location of the child, even visiting or sending presents to the child. *See Castillo v. Castillo*, 597 F. Supp. 2d 432, 439 n.11 (D. Del. 2009) (declining to toll where the left-behind parent knew the exact location of the child); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (same); *In re Robinson*, 983 F. Supp. 1339, 1346 n.10 (D. Colo. 1997) (same).

Courts also decline to toll where the left-behind parent did not make diligent efforts to locate the child. *See Giles v. Bravo*, 2012 WL 704910, at *7 (D. Nev. Jan. 27, 2012) (noting that petitioner "exhibited a consistent attitude of acquiescence over a significant period of time"); *Garza-Castillo v. Guajardo-Ochoa*, 2012 WL 523696, at *4 (D. Nev. Feb. 15, 2012) (finding "little evidence" that left-behind parent engaged in efforts to locate the child other than his own testimony); *Edoho v. Edoho*, 2010 U.S. Dist. LEXIS 83786, at *18 (S.D. Tex. Aug. 17, 2010) (declining to apply equitable tolling where left-behind parent waited six months before filing a missing persons reports and only searched for the child by calling the abducting parent's former place of employment once a month); *In re Wojcik*, 959 F. Supp. 413, 420 (E.D. Mich. 1997) (declining to apply equitable tolling where the left-behind parent waited

eight months before contacting the French Central Authority and took no steps to locate his children other than filing for divorce in France).

Certain courts addressing the issue of equitable tolling have noted that it is especially appropriate where it is "shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period." *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002); *see also Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998).

This Court should grant certiorari to resolve the split between the Courts of Appeals on this important issue.

B. Tolling is necessary to give force to the underlying principles and purposes of the Hague Convention.

Article 18 of the Convention provides that the authority hearing the case may order the return of the child "at any time." *See* Convention, Art. 18. While courts have always retained the power of equitable discretion to repatriate abducted children, every court of appeals except the Second Circuit—as well as the majority of federal district courts—that has considered the issue has nonetheless concluded that equitable tolling or a similar tolling principle is necessary under Article 12, with good reason. Unlike equitable discretion, equitable tolling deters child abduction before it occurs.

Equitable tolling provides a clear guideline to lower courts and, in turn, sends a clear message to a would-be abducting parent: If you abduct your child to the United States and conceal that child's whereabouts, and your concealment causes a delay in the filing of a

petition for return, you will not benefit from your wrongful action. Equitable tolling deters abduction and concealment by completely removing the incentive for and benefit of concealing an abducted child.

The Second Circuit's vision of equitable discretion as the lone deterring mechanism for Article 12 sends a very different message to a would-be abducting parent: If you abduct your child to the United States and conceal that child's whereabouts, and your actions succeed in causing a delay in the filing of a petition for return, there is a reasonable chance you will benefit from your actions because you will be able to raise the Article 12 settled defense and avoid return of the child. Day after day, the longer your child remains in the United States—and the better you are at concealing the child's whereabouts from the left-behind parent—the more settled the child will become in the eyes of the court, and the better your chances at gaming the system and obtaining a custody determination by a court in the United States.

Equitable discretion incentivizes abducting parents to take a gamble—a gamble they are likely to win. Indeed, consider that, with the exception of courts that have applied tolling to the one-year filing period of Article 12, only two courts in published decisions have ever ordered the return of a child after making a well-settled finding. *See F.H.U. v. A.C.U.*, 48 A.3d 1130, 1146–47 (N.J. Super. 2012); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003). The existence of general "equitable discretion" is insufficient to deter the abduction and concealment of children when it is so

seldom invoked and will be only one of many factors considered by courts.

The Second Circuit is now the only United States Court of Appeals to reject the concept of equitable tolling and allow abducting parents to raise the well-settled defense. Far from deterring child abduction and concealment, the Second Circuit's ruling creates a strong incentive for abducting parents to conceal children within its jurisdiction to bolster their chances of a settled finding.

II. THE PETITION RAISES AN IMPORTANT QUESTION CONCERNING THE PROPER INTERPRETATION OF "SETTLED" WITHIN ARTICLE 12

A. Where an abducted child and abducting parent are residing in the United States illegally and present no evidence of a viable basis to change the child's status, as a matter of law, the abducted child cannot be "settled" in the United States under Article 12.

The Second Circuit interpreted the term "settled" as meaning that the child has significant emotional and physical connections demonstrating security, stability, and permanence in that child's new environment. Op. at 23 (citation omitted). It endorsed the view that the settled inquiry is "concerned with the present" only, so a child's immigration status should be relevant to the settled analysis only to the extent that there is an "imminent threat of removal." Op. at 24, n. 16 (quoting *In re B. Del C.S.B.*, 559 F.3d at 1001–02).

The court held that, when deciding whether a child is settled under Article 12, that child's lack of legal immigration status is not dispositive. Instead, it should be one of many factors to be considered, including, for example, the child's age, the stability of her residence, whether she attends church and school consistently, whether she has friends and relatives nearby, and whether the abducting parent is employed and financially stable. Op. at 21–22. As a threshold matter, the Second Circuit's holding runs counter to the fact that the purpose of the Convention is to deprive the abducting parent's actions of "practical or juridical consequences." Op. at 24 (quoting Perez-Vera Report 429 ¶ 13). The Convention's official explanatory report advises that in order to accomplish the Convention's goal of effectively deterring abducting parents, competent authorities in the State of refuge should not render lawful the wrongful actions of those abducting parents. Perez-Vera Report 429 ¶ 16. In effect, the Second Circuit's decision shields abducting parents from facing negative consequences for their wrongdoing, thereby encouraging them to abduct their children into the United States and conceal them within the jurisdiction of these courts.

Moreover, the Second Circuit's myopic focus on the "present" time is essentially outcome-determinative. In stark contrast to other factors that courts can weigh respectively and collectively to assess whether a child is settled, the "unsettling" effects of a lack of legal immigration status (including the lack of a legitimate basis under law for changing that status) are inherently more severe over the long-term. To focus on the risk of immediate deportation, which concededly remains remarkably low, misses the mark. For a young child, the lack of legal

immigration status may appear to have negligible impact on his or her present life—he or she is not at all likely to be deported, may attend public schools, may obtain certain public benefits and is as likely to be supported by a community and social network as a legally resident child. But it is equally true that a child who lacks legal immigration status—including prospects for obtaining legal status under the law—is rendered "unsettled" by that status in ways that become debilitating over time and, to a degree, that ultimately render the child perpetually "unsettled." By way of example: A child lacking legal immigration status cannot obtain a driver's license, will not be able to vote, and even if (s)he attained extraordinary academic success through elementary and high school, would face severe financial aid restrictions for college and post-graduate education. And, even if (s)he overcame this financial obstacle to higher education, (s)he would complete her studies only to encounter the fact that employers are barred by federal law from offering him/her any legitimate employment with appropriate benefits, *see* 8 U.S.C. § 1324(a)(1)(A) and (a)(2), let alone employment commensurate with the skills and abilities (s)he has developed. In perpetuity, the child could not leave this country to visit the left-behind parent or extended family outside the country, or travel internationally for business or pleasure, and reasonably expect re-entry. In this case, as perhaps in many others, the child would face no such restrictions in her former home, England.

Each year, hundreds of petitions are filed pursuant to the Hague Convention in federal and state courts in the United States. In 2009, for example, left-behind parents filed 324 petitions for return of child in the United States, involving 454 children. *See*

"Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction," United States Department of State, April 2010, p. 15. Many of these petitions implicate the well-settled defense under Article 12, and most courts considering the issue in the last decade have utilized the same multi-factor test employed by the Second Circuit.

Because nearly two-thirds of children abducted into the United States are not citizens, a significant number of these petitions concern persons who lack any legitimate pending or existing basis for obtaining legal immigration status (e.g., a well-founded application for residence, citizenship, and/or political asylum). *See* Hague Conference on Private International Law, "A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Preliminary Document No. 3, Part II of October 2006, p. 485 (2007 Update) (observing that 36% of abducting parents bringing children to the United States are U.S. citizens, compared to a global average of 55% who are citizens of the country to which children are abducted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2013

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

Argued: August 22, 2012

Decided: October 1, 2012

Docket No. 11-2224-cv

MANUEL JOSE LOZANO,

Petitioner-Appellant,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent-Appellee.

Before:

KATZMANN, WESLEY, AND LYNCH,
Circuit Judges.

Manuel Jose Lozano appeals from an April 29, 2011 order of the United States District Court for the Southern District of New York (Karas, J.), denying his Petition for Return of Child under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2005), in accordance with the Findings of Fact and Conclusions of Law stated on the record on April 28, 2011, the judgment issued on May 2, 2011, and the written opinion entered on August 22, 2011 further setting forth the district court's reasoning. We hold that while district courts retain discretion to order the return of a settled child to his or her country of habitual residency, the "now settled" defense available under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986), is not subject to equitable tolling. We further hold that when deciding whether a child is settled under Article 12, his or her lack of legal immigration status is not dispositive, but is one of several factors district courts should consider. Finally, we conclude that, in this case, the district court did not err in finding that the child was settled in the United States, and in declining to order her to be returned to the United Kingdom for custody proceedings. Accordingly, for the reasons stated below, the district court's decision denying Lozano's petition is **AFFIRMED**.

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KATZMANN, *Circuit Judge*:

Two now-separated parents dispute whether courts in the United States or the United Kingdom should decide who has custody of their five-year-old child.[1] To resolve this case we must address

[1] The subject child is referred to throughout the district court's decision and the Parties' filings as "the child" to protect her identity. In addition, pursuant to a confidentiality order entered by the Parties, with the district court's consent, information that could be used to identify the iden-

two questions of first impression for this Court regarding the interpretation of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *reprinted* in 51 Fed. Reg. 10,494 (Mar. 26, 1986) ("Hague Convention" or "Convention"): (1) whether the "now settled" defense[2] to the return of an abducted child is subject to equitable tolling; and (2) whether a child who lacks legal immigration status in the United States can nevertheless be found to be settled here within the meaning of the Convention. We hold that courts cannot equitably toll the one-year period before a parent can raise the now settled defense available under Article 12 of the Convention, and that when making a now settled determination, courts need not give controlling weight to a child's immigration status. We also consider and reject the petitioner's objections to the district court's (Karas, J.) findings of fact.

BACKGROUND

A. Factual Background

Diana Lucia Montoya Alvarez ("Alvarez") and Manuel Jose Lozano ("Lozano") (collectively, the "Parties"), who are both originally from Colombia,

tity or location of the child, as well as privileged medical or mental health information, was withheld.

[2] As described further *infra*, the Hague Convention requires that a child wrongfully removed from a country be returned to that country in order to undergo a custody determination, unless the child is "now settled in its new environment." Convention, art. 12.

met and began dating in London in early 2004. *In re Lozano*, 809 F. Supp. 2d 197, 203 (S.D.N.Y. 2011). They never married. *Id.* at 203-04. The Parties' descriptions of their relationship differ. Lozano acknowledges that he and Alvarez had "normal couple problems," but claims that they were generally "very happy together." *Id.* at 204 (internal quotation marks omitted). In contrast, Alvarez asserts that Lozano"treat[ed] her badly." *Id.* She testified that, among other things, Lozano "tried to kick her in the stomach when she was pregnant, . . . called her a prostitute, and raped her four times." *Id.* Lozano denies all of these allegations. *Id.* The district court found that Lozano's claims that he never insulted or mistreated Alvarez in any manner were not credible, but also concluded that there was insufficient evidence from which to conclude that Lozano had physically or sexually abused either Alvarez or the child. *Id.* Accordingly, apart from finding that Lozano mistreated Alvarez in some way, the district court declined to make precise findings regarding what abuse occurred. *See Id.*

From the child's birth on October 21, 2005, until November 19, 2008, Lozano, Alvarez, and the child lived together in London. *Id.* at 206-07. In October 2008, Alvarez spoke with the child's doctor regarding a host of concerns, including the child's silence at the nursery, frequent crying, nightmares, and bed-wetting. *Id.* The child's nursery manager also noted the child's unusual behavior and concluded that the "home 'environment obviously had a negative effect upon [her].'" *Id.* at 207. Based on the foregoing, the court found that the child had been exposed to, and negatively

affected by, the problems in the couple's relationship. *Id.*

On November 19, 2008, shortly after visiting her sister Maria in New York, Alvarez "left [the couple's apartment] to bring the child to nursery school and never returned." *Id.* at 209. For the next seven months, Alvarez and the child resided at a women's shelter. *Id.* In early July of 2009, Alvarez and the child left the United Kingdom, eventually traveling to New York, where they have lived since that time. *Id.* at 210.

In New York, Alvarez and the child live with Alvarez's sister Maria, along with Maria's partner, daughter, and granddaughter. *Id.* at 211. Alvarez has not had a job in the United States, but Maria has been employed as a nanny for the same family for four years and her partner owns a grocery business. *Id.* "Because [Alvarez] and the child have British passports, they were allowed to enter the United States without a visa" for a stay of ninety days or less. *Id.* This period, however, expired in October 2009. *Id.* Alvarez testified that she has spoken with immigration authorities about the possibility of being sponsored by Maria, who is a United States citizen. *Id.* Since her arrival in New York, the child has attended the same school and, at the time of the proceedings before the district court, was enrolled in kindergarten. *Id.* The child's Academic Standards Reports from the 2009–2010 school year indicate that the child has been making progress both socially and academically. *Id.* Outside of school, in addition to spending time with members of her extended family, the child has friends whom she meets at the park and the library. *Id.* The child is

also enrolled in ballet classes and, on the weekends, attends church with Alvarez. *Id.* at 212.

After arriving in New York, both the child and Alvarez began receiving therapy from a psychiatric social worker at a family medical clinic. *Id.* The therapist testified that "when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office." The therapist further noted that the child "would wet herself, was hypervigilant, and had a very heightened startle response." *Id.* By February 2010, the therapist diagnosed the child with post-traumatic stress disorder ("PTSD") caused by her "experience living in the United Kingdom before coming to New York, including living in a shelter system, having to move to a new country, and knowing that her mother had been harmed or threatened." *Id.* Within six months of arriving in New York, however, Alvarez reported that the child's behavior had improved. *Id.* The therapist agreed with this assessment, describing the child as "'completely different.' " *Id.* In particular, the child had stopped bed-wetting, had made friends at school, was excited to play, and was able to speak freely regarding her feelings. *Id.*

After Lozano filed his petition for return in December 2010, Alvarez and the child resumed meeting with the therapist. *Id.* In a December 9, 2010 meeting, "the child 'stated that she was scared because her mommy seemed so worried.' " *Id.* (internal quotation marks omitted). The therapist's notes from a January 31, 2011 session indicate that when asked, out of Alvarez's presence, whether she wanted to see Lozano, the child responded "no." *Id.*

After Alvarez's departure, Lozano took a number of steps to attempt to find his child. Immediately after Alvarez left, he reached out to her sister in London, who denied any knowledge of Alvarez's whereabouts. *Id.* at 209. In the summer of 2009, Lozano filed an application with a British court to "ensure that he obtains regular contact with his child." *Id.* at 210 (brackets omitted). He also, via court filing, submitted orders to Alvarez's sisters and her former counsel, as well as the child's nursery and doctor and various police and government offices, seeking information on the child's whereabouts. *Id.* "After . . . 'exhaust[ing] all possibility that [the child] was still in the [United Kingdom],' on March 15, 2010, [Lozano] filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom."[3] *Id.* at 210. The application was sent to the United States Department of State Office of Children's Issues on March 23, 2010. *Id.*

B. Proceedings Before the District Court

On November 10, 2010, Lozano filed a Petition for Return of Child (the "Petition") pursuant to Article 2 of the Hague Convention and the International Child Abduction Remedies Act, 42 U.S.C.

[3] Article 6 of the Convention specifies that each "Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." These duties include "discover[ing] the whereabouts of a child who has been wrongfully removed or retained" and "initiat[ing] or facilitat[ing] the institution of judicial or administrative proceedings with a view to obtaining the return of the child." Convention, art. 7(a), (f).

§ 11603 (2005) ("ICARA"), in the United States District Court for the Southern District of New York, requesting an order requiring that the child be returned to London to have a British court make a custody determination. *Id.* at 202. Accompanying the Petition was an Emergency Petition for Warrant in Lieu of Writ of *Habeas Corpus* ("Emergency Petition").

Both parties subsequently retained experts to examine the child and determine whether returning the child to the United Kingdom would pose a risk of causing her psychological harm. Alvarez's expert, Dr. B.J. Cling, concluded that "the child was 'potentially at risk' " of " 'another psychological breakdown' " if she "were to be forcibly returned to the [United Kingdom] for custody evaluation." *Id.* at 214. Lozano's expert, Dr. Michael Fraser, concluded that the child was at an " 'increased risk for some degree of psychological maladjustment if she is required to move again; but the potential negative effects depend on many factors.'" *Id.* at 216.

The Court held an evidentiary hearing on February 2 and 3, 2011, at which it admitted both parties' proffered expert reports, received exhibits into evidence, and heard testimony from Lozano, Alvarez, the therapist, Dr. Cling, and Dr. Fraser. *Id.*

On February 18, 2011, the Parties submitted post-trial memoranda of law upon which oral argument was held on April 28, 2011. *Id.* At the end of oral argument, after reciting its findings of fact and conclusions of law, the court denied Lozano's Petition. *Id.* The next day, the court issued an order dismissing the Petition and enter-

ing judgment for Alvarez. *Id.* On August 22, 2011, the court filed a written opinion further setting forth its reasoning.

In a thorough opinion, the district court first held that Lozano had made out a *prima facie* case of wrongful retention under the Hague Convention because: (1) the child was a habitual resident of the United Kingdom; (2) Alvarez's unlawful removal of the child breached Lozano's custody rights under English law; and (3) Lozano exercised parental rights at the time the child was removed. Accordingly, the court noted that the child must be returned to the United Kingdom *unless* Alvarez established an affirmative defense. *Id.* at 219-20. Before the district court, Alvarez raised two of the affirmative defenses available under the Convention. On appeal, however, only the now settled defense is at issue.[4] With regard to Alvarez's raising of the now settled affirmative defense, Lozano noted that this defense is unavailable until "one year has elapsed from the date of the [child's] wrongful removal or retention," Convention, art. 12, and argued that the one-year period should be tolled until the time Lozano reasonably could have learned of his child's where-

[4] The district court rejected Alvarez's second defense —that "there is a grave risk" that the child's return to the United Kingdom "would expose [her] to physical or psychological harm or otherwise place the child in an intolerable situation." *Id.* at 220 (quoting Hague Convention art. 13(b)). Specifically, the court found that there was "simply insufficient evidence that merely returning to the United Kingdom—even if the country was the site of some of the child's trauma, whether caused by the child witnessing Petitioner's abuse of Respondent or by being in the shelter—in and of itself would present a grave risk" to the child. *Id.* at 225.

abouts. *Lozano*, 809 F. Supp. 2d at 226. The district court disagreed, concluding that the

> one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling. A petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located.

Id. at 228. Citing the Convention's text, history and purpose, the district court found that the "settled defense is not [intended] to give petitioners a reasonable amount of time in which to bring their claims," but "to take into account that if the child has become settled, its interests have to be weighed." *Id.* As an alternative basis for its decision, the district court held that "even if equitable tolling could apply to Convention petitions," it was not "warranted in this case." *Id.* at 229.

Having rejected Lozano's tolling argument, the district court next held that the now settled defense applied and was a sufficient reason to have a United States court, as opposed to an English court, decide the child's custody. *Id.* at 234. The district court engaged in a detailed analysis of various factors that weighed both for and against the child remaining in the United States for further proceedings, including that: (1) the child has been in the same location for the duration of her time in the United States; (2) the child has shown social and academic progress; (3) Alvarez appropriately cares for the child; (4) Alvarez is unemployed; (5) the child is too young

to form certain types of connections; and (6) both Alvarez and the child have overstayed their visas and thus are not legally residing in the United States. *Id.* at 231-34. With respect to the final factor, Judge Karas rejected Lozano's argument that the child could not be settled (as a matter of law) so long as she lacked lawful immigration status. Instead, he stressed that "[t]here is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 233.

Finally, the district court considered whether to exercise its discretion to order repatriation despite its finding that the child is settled in New York. *Id.* at 234-35. Judge Karas declined to do so, focusing largely on the "specific impact of returning to the United Kingdom on this particular child" who "[b]y all accounts . . . is much improved since arriving in the United States, but . . . is clearly more vulnerable than an average five-year-old child who has never experienced trauma." *Id.* at 234.

On May 27, 2011, Lozano filed a timely notice of appeal from the district court's denial of his petition.

C. The Government's Brief as *Amicus Curiae*

By letter dated July 11, 2012, this Court notified the United States Department of State (the "Department") that oral argument in this case was scheduled to take place on August 22, 2012, and requested that the Secretary of State submit her views concerning: (1) whether the one-year period before a party can raise the "now settled" defense

in Article 12 of the Convention is susceptible to equitable tolling; and (2) what significance should be given to a child's lack of legal immigration status in the United States when determining whether a child is settled within the meaning of Article 12.

On August 20, 2012, the United States submitted a memorandum brief as *amicus curiae* recommending that this Court find, in pertinent part, that:

> (1) Equitable tolling does not apply to the one-year period under Article 12; instead, the court retains equitable discretion to order a child's return at any time. A court may do so even if the child is 'now settled.' . . . [And,] (2) [t]he child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Amicus Br. At 2.

DISCUSSION

On appeal, Lozano raises three principal objections to the district court's decision. First, he argues that, as a matter of law, the district court erred in permitting Alvarez to raise the now settled defense because the one-year period in Article 12 should have been equitably tolled until such time as he could have reasonably located his child. Second, Lozano contends that the district court erred in finding that the child is settled in New York despite the fact that neither the child nor

her mother have legal status in the United States. Finally, even if lack of legal immigration status "does not preclude a well-settled finding as a matter of law," Lozano avers that "the District Court erred in finding that Alvarez proved by a preponderance of the evidence that the parties' daughter is well-settled in the United States." Pet'r's Br. at 46. Specifically, Lozano takes issue with the district court's factual finding that there is "stability in [the child's] family, educational, social, and most importantly, home life." *Id.* at 51 (internal quotation marks omitted). After stating the applicable standards of review and the relevant law of treaty interpretation, we address each of Lozano's arguments in turn.

I. Standard of Review

"In cases arising under the Convention and ICARA, we review a district court's factual determinations for clear error." *Mota v. Castillo*,— F.3d—, 2012 WL 3330176, at *3 (2d Cir. Aug. 15, 2012). Interpretation of the Convention, however, is an issue of law, which we review *de novo*. *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001) ("*Blondin IV*"). We also review *de novo* "the district court's *application* of the Convention to the facts it has found." *Gitter v. Gitter*, 396 F.3d 124, 129 (2d Cir. 2005) (internal quotation marks and brackets omitted)[5]

[5] In *Blondin IV*, this Court relied on precedent from the Third and Ninth Circuits to hold that the "*application* of the Convention to the facts . . . like the *interpretation* of the Convention, is subject to *de novo* review." 238 F.3d at 158 (citing *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995) and *Crec v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998)).

II. Law of Treaty Interpretation

"In interpreting a treaty, it is well established that we begin with the text of the treaty and the context in which the written words are used." *Swarna v. Al-Awadi*, 622 F.3d 123, 132 (2d Cir. 2010) (internal quotation marks omitted). "The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (internal quotation marks omitted). "General rules of statutory construction may be brought to bear on difficult or ambiguous passages, but we also look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the signatory parties in determining the meaning of a

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In at least two additional opinions, we have confirmed that a *de novo* standard of review applies to an appeal from a district court's application of the Convention. *See, e.g., Mota*, 2012 WL 3330176, at *3; *Gitter*, 396 F.3d 124.

We think an abuse of discretion standard might be more apt where, as here, the treaty provision being applied requires the district court to engage in an equitable balancing of a multitude of factors. Cf. *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 81 (2d Cir. 2003) (holding that this Court will review for abuse of discretion a district court's decision to deny a plaintiff's request for equitable tolling of a filing deadline). It is, however, unnecessary for us to decide this issue because, apart from Lozano's purely legal arguments that the one-year period in Article 12 is subject to equitable tolling and that lack of valid immigration status precludes a settled finding, Lozano challenges only the factual findings underpinning the district court's decision. These we review only for clear error.

treaty provision." *Swarna*, 622 F.3d at 132 (internal quotation marks and brackets omitted); *Medellín v. Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the . . . postratification understanding of signatory nations." (internal quotation marks omitted)). Additionally, "while the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the 'Executive Branch's interpretation of a treaty is entitled to great weight." *Swarna*, 622 F.3d at 133 (quoting *Abbott v. Abbott*, 130 S. Ct. 1983, 1992 (2010)).

III. Courts cannot equitably toll the one-year period before a parent can assert the now settled defense.

Lozano argues that the district court "should have applied equitable principles to toll the commencement of Article 12's one-year filing period until the date [Lozano] reasonably could determine that [Alvarez] had removed their daughter from the United Kingdom to the United States." Pet'r's Br. at 15.[6] Alvarez counters that the district court properly found that the one-year period in Article 12 is not subject to equitable tolling. Resp't's Br. at 23-33. We agree with the district court and hold that while an abducting parent's

[6] In particular, Lozano contends that the one-year period should not have commenced until February 22, 2010, the date when he received the final responses to the orders of disclosure regarding his daughter's whereabouts. Pet'r's Br. at 18.

conduct may be taken into account when deciding whether a child is settled in his or her new environment, the one-year period set out in Article 12 is not subject to equitable tolling.

A. *The Text of the Convention*

Neither Article 12 of the Hague Convention nor its implementing legislation, ICARA,[7] explicitly permit or prohibit tolling of the one-year period before a parent can raise the now settled defense.[8] Article 12 provides, in relevant part:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date

[7] The ICARA specifies that "[i]n the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing— . . . (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies." 42 U.S.C. § 11603(e)(2)(B).

[8] While the text of the Convention does not explicitly address the issue, we note that the text does provide one clue that tolling was not anticipated. The language of Article 12 expressly starts the running of the one-year period "from the date of the wrongful removal or retention." It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover the child's whereabouts, to run the period "from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts." But the drafters did not adopt such language. As discussed below, the drafting history demonstrates that this was a conscious choice, and that the drafters specifically rejected a proposal to have a different date trigger the start of the one-year period when the child's whereabouts had been concealed. *See infra* at 17-18.

> of the commencement[9] of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Id. Accordingly, the default presumption under the Convention is that a child *shall* be returned to the state from which she originally was wrongfully removed unless both of two conditions are met: (1) one year has elapsed between the date of wrongful removal and the date proceedings commence; and (2) the child is found to be "now settled in its new environment." *Id.*

Even if these two conditions are met, Article 12 does not bar the Central Authority of a Contracting State from ordering the return of a settled child. As we explained in *Blondin IV*, Article 12 allows—"but does not . . . require—a judicial or administrative authority to refuse to order the repatriation of a child on the *sole* ground that the

[9] The ICARA provides that "the 'commencement of proceedings,' as used in Article 12 of the Convention," does not occur until a person files a petition in a civil action for the return of the child in a court that has jurisdiction in the place where the child is located at the time the petition is filed. 42 U.S.C. §§ 11603(b), (f)(3).

child is settled in its new environment, if more than one year has elapsed between the abduction and the petition for return." 238 F.3d at 164. Put differently, "if more than one year has passed, a 'demonstra[tion] that the child is now settled in its new environment' may be a sufficient ground for refusing to order repatriation." *Id.*[10] Thus, while the text of Article 12 does not prohibit equitable tolling, the way the provision functions renders this sort of equitable relief unnecessary. Unlike a statute of limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency. *See Lozano*, 809 F. Supp. 2d at 227-28 (reasoning that the one-year period in Article 12 is not analogous to a statute of limitations); *Matovski v. Matovski*, No. 06 Civ. 4259 (PKC), 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007) (same); *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (same); *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998) (same), vacated on other grounds, 191 F.3d 23 (1st Cir. 1999).

[10] This interpretation of Article 12 is further bolstered by Article 18, which provides that none of the provisions in the Convention "limit the power of a judicial or administrative authority to order the return of the child at any time." Convention, art. 18.

B. *The History and Purpose of the Article 12 Now Settled Exception*

Tolling the time before a parent can raise the settled defense is also inconsistent with the treaty's purpose. A report prepared by the official Hague Conference reporter for the Convention, Elisa Pérez-Vera,[11] provides an overview of the Convention's goals and a detailed analysis of each of its provisions. Elisa Pérez-Vera, *Explanatory Report*, in 3 Conférence de la Haye de droit international privé, Actes et Documents de la Quatorzième session, Enlèvement d'enfants 426 (1982) ("Pérez-Vera Report"), available at www.hcch.net/upload/expl28.pdf. Both the Convention's text and the Pérez-Vera Report state that the treaty's primary aim is to deter family members from removing children to jurisdictions more favorable to their custody claims in order "to obtain a right of custody from the authorities of the country to which the child has been taken." Pérez-Vera Report at 429 ¶ 13; Convention, art. 1 ("The objects of the present Convention are—(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of

[11] Elisa Pérez-Vera was "the official Hague Conference reporter for the Convention." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,503. "Her explanatory report [was] recognized by the Conference as the official history and commentary on the Convention," *id.*, and we have previously held that "it is an authoritative source for interpreting the Convention's provisions," *Croll v. Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (citation omitted), abrogated on other grounds by *Abbott*, 130 S. Ct. 1983; *see also Gitter*, 396 F.3d at 129 & n.4.

access under the law of one Contracting State are effectively respected in the other Contracting States."). To that end, the Convention "places at the head of its objectives the restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting state.' " *Id.* at ¶ 16.

It is true that nothing in the text of the "dispositive part of the Convention . . . reference[s] . . . the interests of the child to the extent of their qualifying the Convention's stated object." *Id.* at 431 ¶ 23. But the Pérez-Vera Report cautions against construing the Convention's "silence on this point" as "lead[ing] one to the conclusion that the Convention" suggests that children's interests should be "ignore[d]" when "regulating all the problems which concern them." *Id.* Instead, the Pérez-Vera Report states that a concern for children's "true interests" was the primary reason the signatory states "drew up the Convention." *Id.* ¶¶ 23-24; see also Blondin IV, 238 F.3d at 161 (noting that while the Hague Convention is not "designed to resolve underlying custody disputes," "[t]his fact . . . does not render irrelevant any countervailing interests the child might have."). Simply put, the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child's best interests; rather, the Convention embodies the judgment that *in most instances*, a child's welfare is best served by a prompt return to that country. The signatory states, however, were aware that there are situations where "the removal of the child can . . . be justified by objective reasons which have to do either with [the child's] person,

or with the environment with which [the child] is most closely connected." Pérez-Vera Report at 432 ¶ 25. Accordingly, the Convention "recognizes the need for certain exceptions" to the signatory states' "general obligation[ ] . . . to secure the prompt return of children who have been unlawfully removed or retained." *Id.* Pérez-Vera describes these "exceptions" as "concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area." *Id.*; see also *Blondin IV*, 238 F.3d at 164 (noting that the Convention's drafters recognized that, despite the general aim of "ensur[ing] the return of abducted children," there "could come a point at which a child would become so settled in a new environment that repatriation might not be in its best interest." (internal quotation marks and citations omitted)).

The Convention constrains Central Authorities' discretion to decline to order a child's return to his or her country of habitual residency when return would not be in that child's best interests. Article 12 establishes that a Central Authority cannot even consider the child's interest in remaining in the country to which she has been abducted until after a year has elapsed. See Pérez-Vera Report at 458 ¶ 107 ("In the first paragraph [of Article 12], the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith."); *Amicus* Br. at 9 ("As described by the United States, the Convention thus provided for a one-year period in which 'no assimilation of the child was presumed to have occurred' and 'return could be refused only on the

grounds set forth' expressly, e.g. severe risk to the child. After this initial one-year period, 'assimilation became an open question.'" (internal citation omitted)).

The Pérez-Vera Report acknowledges that the one-year period set forth in Article 12 is somewhat "arbitrary." *Id.* ("[T]he difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard."). However, the drafters of the Convention saw value in agreeing to a "single time-limit of one year" and setting aside "the difficulties encountered in establishing the child's whereabouts." *Id.* at ¶ 108. Indeed, the drafters considered and rejected an alternative proposal: A preliminary draft of the Convention included two time-periods in Article 12, depending on whether the child had been hidden. Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010). The Pérez-Vera Report explains that the framers jettisoned this approach to eliminate "the inherent difficulty in having to prove the existence of those problems which can surround the locating of [a] child." Pérez-Vera Report at 459 ¶ 108.[12]

In sum, the Convention's drafting history strongly supports Alvarez's position that the one-

[12] The Government's brief notes that after the drafters had settled on a single time-limit, the United States "urged a longer period in light of the difficulty of locating the child . . a suggestion that presupposes that the single period would not toll at least for that reason." *Amicus* Br. at 9 (internal citation omitted).

year period in Article 12 was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed. If this understanding of the second paragraph of Article 12 is correct, allowing equitable tolling of the one-year period would undermine its purpose. A child may develop an interest in remaining in a country in which she has lived for a substantial amount of time regardless of her parents' efforts to conceal or locate her.

C. *The Executive Branch's Interpretation of Article 12*

As noted, courts give "great weight" to the "Executive Branch's interpretation of a treaty" given "the nature of the document and the unique relationships it implicates." *See Swarna*, 622 F.3d at 133. Moreover, while the Convention is not a statute that the Department is charged with implementing, it has played a critical role in its adoption and day-to-day operation.[13] Accordingly,

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[13] In its *amicus* brief, the Government states that

> The Department of State represented the United States at the negotiation of the Convention, recommended that the President transmit it to the Senate for approval, was instrumental in proposing its implementing legislation to Congress, has attended periodic international meetings to review the operation of the Convention, and is designated pursuant to the Convention as the United States' "Central Authority," with responsibility for cooperating with its counterparts in other states parties to "secure the prompt return of children and to achieve the other objects of the Convention."

deference to the Department's interpretation of the treaty is warranted to the extent it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, we derive further support for our interpretation of the Convention from the Department's well-reasoned and thorough interpretation of Article 12, as presented in the Government's amicus brief. Employing an interpretive process entirely in line with our own, the Government reached the same conclusion, that is, that "tolling does not apply to the one-year period under Article 12." *Amicus* Br. at 2, 6-11.[14]

Amicus Br. at 2 n.1 (quoting Convention, arts. 6,7); *see also* 22 C.F.R. § 94.2 (designating the "Office of Children's Issues in the Bureau of Consular Affairs . . as the U.S. Central Authority to discharge the duties which are imposed by the Convention and the International Child Abduction Remedies Act upon such authorities.").

[14] The Government's amicus brief in this case is not the first occasion on which the Department has considered whether the Convention permits equitable tolling of the one-year period in Article 12. See *Skidmore*, 323 U.S. at 140 (the weight to be accorded an agency's judgment "in a particular case will depend upon," *inter alia*, "its consistency with earlier and later pronouncement"). In its "Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction," 51 Fed. Reg. 10,503 (1986) ("*Legal Analysis*"), the Department opined that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is . . . relevant to the ultimate disposition of the return petition." More recently, in response to a 2006 questionnaire on the practical operation of the Convention, the Department noted that certain United States courts have equitably tolled the one-year period in Article 12 and, expressed its support for "the concept of equitable tolling of the one year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in

D. *Decisions of Our Sister Circuits*

At least three of our sister Circuits have permitted the one-year period in Article 12 to be equitably tolled. *See Dietz v. Dietz*, 349 F. App'x 930, 932-33 (5th Cir. 2009) (summary order); *Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2009);

order to prevent the timely filing of a Hague petition." Hague Convention on Private International Law, "Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Prel. Doc. No. 2 of October 2006, at 217, 577, available at http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf ("*Questionnaire Responses*").

The Department's position as articulated in the Government's *amicus* brief is not inconsistent with these prior statements. As early as 1986, the Department maintained that courts may consider whether an abducting parent has concealed the child's whereabouts when deciding whether to grant a return petition. *Legal Analysis*, 51 Fed. Reg. 10,503. It has never, however, taken the position that courts should be precluded from considering whether a child is settled exclusively because of a parent's wrongful conduct. Indeed, in response to the 2006 questionnaire on the Convention's practical operation, the Department noted that some United States courts had equitably tolled the one-year period in Article 12, but only endorsed the concept that courts should consider whether denying a return petition will create an incentive for a parent to conceal his child's location. *Questionnaire Responses*, 577. This statement fully aligns with the Department's position in this case, that

> equitable tolling, in the traditional sense, of Article 12's one-year period to preclude consideration of the child's settlement is not warranted. But the court considering a petition filed more than a year after the child's wrongful removal may still exercise equitable discretion to require the child's return.

Amicus Br. at 13.

Furnes v. Reeves, 362 F.3d 702, 723-24 (11th Cir. 2004). In particular, the Eleventh Circuit held in Furnes that equitable tolling is justified where a parent secrets the child from the parent seeking return because: (1) otherwise, a "parent who abducts and conceals [a child] for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available"; and (2) "[u]nless Congress states otherwise, equitable tolling should be read into every statute of limitations." 362 F.3d at 723-24 (internal quotation marks omitted). As for the first argument, the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct—a Central Authority's discretion to order the return of a child, even when a defense is satisfied. See *Blondin v. Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) ("[E]ven where the grounds for one of these 'narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent."). The second argument is also unpersuasive as it wrongly treats the one-year period in Article 12 as a statute of limitations.[13]

[13] The Ninth Circuit's decision in *Duarte* relies mainly on the Eleventh Circuit's faulty reasoning in *Furnes*. See 526 F.3d at 569-70. Moreover, a subsequent Ninth Circuit decision—*In re B. DEL C.S.B.*, 559 F.3d 999 (9thCir. 2009) —suggests that there may be limits to the *Duarte* holding. Id. at 1014 ("Given that equitable tolling may permit the return of children otherwise settled in their new environment, we adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions."). Further, in *Dietz*, the Fifth Circuit assumed that it

IV. Lack of legal immigration status does not preclude a court from finding a child to be settled.

Having determined that the district court properly permitted Alvarez to raise the Article 12 now settled defense, we must consider whether the district court erred in finding the child to be settled in New York. On appeal, Lozano primarily asserts that "[w]here an abducted child resides in the abducted-to country illegally, a well-settled finding should be barred as a matter of law." Pet'r's Br. at 36. We disagree. Given the Convention's text and purpose, immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12. Additionally, we hold that, in any given case, the weight to be ascribed to a child's immigration status will necessarily vary.

Neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proved. See Pérez-Vera Report at 459 ¶ 109. Where a term is undefined in a statute, "we normally construe it accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). In this regard, the use of the term settled suggests a stable and permanent relocation of the child. See Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/settled (last

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could equitably toll the one-year period without offering any legal basis for its view, likely because the respondent did not challenge it. 349 F. App'x at 933 ("[Respondent] does not attack the use of equitable tolling as such. Indeed, he does not appear to question the court's application of tolling to the summer of 2006."). Accordingly, the Fifth Circuit's decision holds limited persuasive power.

visited September 26, 2012) (defining "settled" as "to establish or secure permanently"); Dictionary.com, www.dictionary.reference.com/browse/settled?s=t (last visited September 26, 2012) (defining "settled" as "to make stable; place in a permanent position or on a permanent basis").

Statutory terms are also to be interpreted in light of their "placement and purpose in the statutory scheme." *Holloway v. United States*, 526 U.S. 1,6 (1999). Although one of the primary objectives of the Convention is to ensure the "prompt return" of abducted children without reaching the merits of underlying custody disputes, *see* Hague Convention, art. 1, the settled exception recognizes that there may come a point at which "repatriation might not be in [the child's] best interest." *Blondin IV*, 238 F.3d at 164. The Explanatory Report provides that exceptions to the return of the child, such as Article 12, "are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter" and that "a systematic invocation of [the] exceptions . . . would lead to the collapse of the whole structure of the Convention." Pérez- Vera Report at 434-35 ¶ 34. To this end, the State Department concluded that to be "settled" requires "nothing less than substantial evidence of the child's significant connections to the new country." *Legal Analysis*, 51 Fed. Reg, at 10,509 (1986).

In light of these considerations, "settled" should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment. *See, e.g., In re N.*, [1990] 1 FLR 413 (Eng. High Court of Justice, Fam. Div.), *available*

at www.hcch.net/incadat/fullcase/0106.htm. In making this determination, "a court may consider any factor relevant to a child's connection to his living arrangement." *Duarte*, 526 F.3d at 576. Such an approach is in line with the Convention's overarching focus on a child's practical well-being. Factors that courts consider should generally include:

> (1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly; (5) the respondent's employment and financial stability; (6) whether the child has friends and relatives in the new area; and (7) the immigration status of the child and the respondent.

Duarte, 526 F.3d at 576; *see also Matovski*, 2007 WL 2600862, at *13 (same); *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 (JG), 2005 WL 67094, at *8 (E.D.N.Y. Jan. 13, 2005) (same); *Koc v. Koc*, 181 F. Supp. 2d 136, 152-54 (E.D.N.Y. 2001) (same). Even as Lozano advocates a categorical rule or strong presumption that lack of lawful immigration status bars a settled finding as a matter of law, he acknowledges that to determine whether a child is settled in his new environment, courts are "permitted to consider any relevant factor surrounding the child's living arrangement—without limitation." Pet'r's Br. at 42 (internal quotation marks omitted). While courts have consistently found immigration status to be a factor when deciding whether a child is settled, no court has

held it to be singularly dispositive.[14] Indeed, the fact-specific multi-factor test that we formally adopt is consistent with the Government's understanding of Article 12 as expressed in its amicus brief. *See Amicus* Br. at 13-15.[15]

Retreating from his initial position that lack of legal immigration status altogether bars a settled finding under Article 12, Lozano next argues that the district court failed to give the child's undocumented status adequate weight. Pet'r's Br. at 46. In particular, Lozano contends that the district court erred because it discounted the significance of the child's lack of immigration status once it found that the child did not face an immediate threat of deportation. *Id.* For example, a child might be ineligible for certain government-conferred benefits. We are not persuaded. The importance of a child's immigration status will

[14] Lozano claims that his position has been adopted by the "majority" of those courts that have considered it. Pet'r's Br. at 37. This assertion is incorrect. District courts across the country have taken into account a child's immigration status when deciding if she is well-settled. *See, e.g., In re Hague Convention*, No. 08-2030-CM, 2008 WL 913325, at *11 (D. Kan. Mar. 17, 2008); *In re Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004). However, only one court of appeals—the Ninth Circuit—has directly addressed "whether a court may find that a child is not 'settled' for the purposes of Article 12 of the Hague Convention for the reason that she does not have lawful immigration status." *In re B. Del C.S.B.*, 559 F.3d at 1001-02. And, in that case, the Ninth Circuit concluded that "the answer is no." *Id.* at 1002.

[15] Citing cases from Canada and the United Kingdom, the Government's brief also notes that "[f]oreign courts have given varying weight to immigration status, depending on the circumstances of the case." *Amicus* Br. at 14.

inevitably vary for innumerable reasons, including: the likelihood that the child will be able to acquire legal status or otherwise remain in the United States, the child's age, and the extent to which the child will be harmed by her inability to receive certain government benefits. Moreover, rather than considering the weight to be given to a child's immigration status in the abstract, courts deciding whether a child is settled must simultaneously balance many factors which, as in this case, may not support the same determination.[16]

Here, the district court's analysis was largely compatible with the approach we prescribe. After noting the array of factors that are relevant to a settled determination, the district court observed that "a number of these factors support a finding that the child is now settled, and there are some that do not." 809 F. Supp. 2d at 231. The court then examined these factors—including the child's immigration status—both independently and in relation to each other. *Id.* at 231-34. The district

[16] The Ninth Circuit has held that because the settled inquiry is "concerned with the present, and not with determining the best interest of the child in the long term," a child's immigration status should only be relevant to the settled analysis to the extent that there is an "imminent threat of removal." 559 F.3d 1013-14. We agree with the Ninth Circuit's observation that the now settled analysis should not be conflated with the custody determination which will follow. *See* Pérez-Vera Report 429 ¶ 13 (noting that Convention's purpose is not to decide custody but to "deprive" an abductor's actions of "practical or juridical consequences"). However, because we can imagine instances where immigration status may be important even if the threat of removal is negligible, we decline to impose a categorical rule that the weight to be given a child's immigration status varies only in accordance with the threat of deportation.

court expressly referenced that the child and Alvarez had overstayed their visas, but observed that there is "nothing to suggest that, at this moment, or in the near future, the immigration status of the child and [Alvarez] is likely to upset the *stability* of the child's life here in New York." *Id.* at 233 (emphasis added). Given the child's psychiatric history and documented "fragility," the district court's focus on "stability" in the near future seems particularly appropriate.[17] Even on *de novo* review, we are not inclined to upset the district court's careful balancing of these many fact-based considerations.

V. The district court's factual findings were not clearly erroneous.

Finally, Lozano contends that the district court's finding are not backed by a preponderance of the evidence because "most of the evidence on the well-settled issue should not be given much weight because it came from [Alvarez's] own self-interested hearsay testimony, and to a lesser extent, from the therapist and child's school records." Pet'r's Br. at 49-50. Relatedly, Lozano claims that Alvarez should have provided "corroborating testimony . . . and other evidence of the child's connections to her new environment." *Id.* at 51. These arguments can be swiftly rejected.

The district court conducted a two-day hearing, after which it made factual findings with respect

[17] At oral argument, Lozano's attorney acknowledged that he had not brought to the district court's attention the ways in which the child's lack of legal immigration status could affect her life in the long-term. Accordingly, we see no error in the district court's failure to consider them.

to each of the now settled factors. At the hearing, Judge Karas not only reviewed a significant amount of evidence but also had the opportunity to observe the Parties' demeanor and assess their credibility. Far from glossing over inconsistencies in the evidence, the district court fully engaged with all of the information that had been presented to it before announcing its determinations. None of Lozano's challenges to these findings leave us with a "definite and firm conviction that a mistake has been committed." *United States v. Kilkenny*, 493 F.3d 122, 125 (2d Cir. 2007) (internal quotation marks omitted)

CONCLUSION

We have considered Lozano's remaining arguments and conclude that they are without merit. For the foregoing reasons we AFFIRM the district court's May 2, 2011 judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10-CV-8485 (KMK)

In re the Application of Manuel Jose Lozano

MANUEL JOSE LOZANO,

Petitioner,

—v—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ORDER

KENNETH M. KARAS, District Judge:

The Court held oral argument in the above-captioned matter on April 28, 2011. For the reasons stated on the Record, the Petition is denied. The Clerk of Court is respectfully directed to enter judgment for Respondent and close this case. The Parties shall inform the Court within two weeks of the date of this Order what they would like the

Court to do with the travel documents of Respondent and the child.

SO ORDERED.

Dated: April 29, 2011
White Plains, New York

/s/ KENNETH M. KARAS
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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10 CV 08485 (KMK)

In Re: The Application of Manuel Jose Lozano

MANUEL JOSE LOZANO,
Petitioner,

—against—

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Kenneth M. Karas, U.S.D.J., and the Court thereafter on April 29, 2011, having handed down an Order (Docket #39), denying plaintiffs petition, it is,

ORDERED, ADJUDGED AND DECREED: that for the reasons stated on the record on April 28, 2011,

the Petition is denied, Judgment is entered in favor of respondent, and the case is hereby closed.

Dated: White Plains, N.Y.
May 2, 2011

/s/ RUBY [ILLEGIBLE]
RUBY [ILLEGIBLE] Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10-CV-8485 (KMK)

In re the Application of: Manuel Jose Lozano

MANUEL JOSE LOZANO,

Petitioner,

—v—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

OPINION AND ORDER

Appearances:

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New York, New York
Counsel for Respondent

KENNETH M. KARAS, District Judge:

I. Background

This case involves a dispute between two parents, Manuel Jose Lozano ("Petitioner") and Diana Lucia Montoya Alvarez ("Respondent"), regarding their five-year-old child.[1] On November 10, 2010, Petitioner filed in this Court a Petition for Return of Child to Petitioner (the "Petition") pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, art. 2, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) ("Hague Convention" or "Convention") and the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 (2005) ("ICARA"), requesting that the Court issue an order requiring that his child be returned to London, United Kingdom, to have a British court make a custody determination. Accompanying the Petition was an Emergency Petition for Warrant in Lieu of Writ of

[1] The subject child is referred to as "the child" to protect her identity. In addition, pursuant to a confidentiality order entered into by the Parties with the consent of the Court, information that could be used to identify the identity or location of the child, as well as privileged medical or mental health information, has been withheld.

Habeas Corpus ("Emergency Petition"). The Emergency Petition sought an order from the Court directing that the child be removed from Respondent and delivered into the temporary protective custody of Social Services while the matter was pending. In the alternative, Petitioner requested that the Court issue an order to show cause: (1) prohibiting the removal of the child from the Court's jurisdiction; (2) requiring Respondent to post a bond; and (3) ordering Respondent to appear before the Court with all passports and travel documents for Respondent and the child. In support of the Petition, Petitioner submitted several exhibits.

On November 12, 2010, the Court held an ex parte telephonic hearing with counsel for Petitioner. Following this hearing, the Court issued an order: (1) ordering Respondent to appear before the Court for a hearing on November 16, 2010; and (2) directing the United States Marshal for the Southern District of New York ("Marshal") to (i) serve Respondent with a copy of the Court's Order, the Petition, the Emergency Petition, and all attachments, and (ii) seize all passports and travel documents for Respondent and the child. (Dkt. No. 11.) On November 15, 2010, the Marshal served Respondent and retrieved the requested passports. On November 16, 2010, Respondent and counsel for Petitioner appeared before the Court. After the hearing, the Court issued an order stating that Respondent would not be required to post a bond and prohibiting Petitioner, or anyone acting on behalf of Petitioner except for his counsel, from contacting Respondent or the child. (Dkt. No. 5.)

On November 23, 2010, counsel for Petitioner and newly obtained counsel for Respondent appeared before the Court at a telephonic conference.[2] Although the Parties and the Court were cognizant of the need to adjudicate Hague Convention matters expeditiously, the Parties agreed to discuss a proposed schedule that would allow both sides an adequate opportunity to conduct discovery, obtain experts, and prepare for a hearing on the merits (the "Evidentiary Hearing"). On December 6, 2010, the Court agreed to the proposed schedule submitted by the Parties. (Dkt. No. 16.) The Parties submitted in limine motions and responses on January 28 and 31, and February 1 and 2, 2011, regarding certain testimony and evidentiary issues. Specifically, each Party sought to exclude the other Party's expert report. In addition, counsel for Respondent expressed concern over revealing the identity of one proposed witness, a therapist who has treated Respondent and the child in New York. The Court held a telephonic conference on January 31, 2011, to discuss these issues. At the conference, the Parties agreed that the therapist's name would not be disclosed and that she would be referred to throughout the proceedings as "the therapist." The Court informed the Parties that it would rule on the motions in limine at the Evidentiary Hearing.[3]

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[2] Counsel for both Petitioner and Respondent have represented their clients on a pro bono basis. The Court noted on the record and repeats here the excellence of their work in this case, and expresses its gratitude for their exemplary efforts.

[3] At the hearing, the Court concluded that both experts were qualified and that the proffered expert testi-

The Court held the Evidentiary Hearing on February 2 and 3, 2011. At the hearing, the Court heard testimony from: (1) Petitioner; (2) Respondent; (3) Dr. B.J. Cling, an expert retained by Respondent for purposes of this proceeding ("Dr. Cling"); (4) a therapist who has treated Respondent and the child in New York (the "therapist"); and (5) Dr. Michael Fraser, an expert retained by Petitioner for purposes of this proceeding ("Dr. Fraser"). Petitioner testified and observed the hearing via videoconference in the London office of his counsel. At the hearing, both Parties also submitted exhibits. On February 18, 2011, both Parties submitted Post-Trial Memorandum of Law. (Dkt. Nos. 32-33.) The Court held oral argument on April 28, 2011 (the "Oral Argument") and, at its conclusion, the Court informed the Parties that it would be denying the Petition. On April 29, 2011, the Court issued an Order dismissing the Petition and entering judgement for Respondent. (Dkt. No. 39.) At the Oral Argument, the Court recited the full procedural history of this case and issued its Findings of Fact and Conclusions of Law on the record. This written opinion further sets forth the Court's Findings of Fact and Conclusions of Law.

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mony and reports were admissible and did not run afoul of either the requirements of the Federal Rules of Evidence or *Daubert*. The Court informed the Parties that it believed the objections went to the weight of the evidence, not its admissibility and, accordingly, the Court would keep the objections in mind when evaluating the evidence. (Tr. 157-58.)

"Tr." cites refer to the transcript of the February 2-3, 2011 Evidentiary Hearing.

II. Findings of Fact

The Parties present vastly different accounts of their relationship and many of the events that transpired between them. As described below, the Court is unable to conclude that one party is entirely credible and truthful and the other completely incredible and untruthful. Instead, in many instances, the actual picture is somewhat murky.

A. The Parties' Relationship

Petitioner and Respondent, who are both originally from Colombia, met and began dating in early 2004 in London. (Ct. Ex. 1 ¶ A1.)[4] Petitioner moved into Respondent's flat about two or three months after they began dating. (Tr. 10.) At the time they met, Respondent was not working and received government benefits; Petitioner worked in maintenance for a tax office and also had a nighttime cleaning job. (*Id.* at 11-12.) The Parties never married. After the Parties moved in together, Petitioner mainly financially supported the household, while Respondent was responsible for cooking, cleaning, and taking care of their child after her birth. (*Id.* at 55-56, 121.) Respondent received incapacity benefits because she suffered from depression. Respondent testified that when she arrived in London, she became very depressed because she missed her family and was unable to obtain a professional job like she had in Colombia; after she resigned from the job that she

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[4] Court Exhibit 1 is a document labeled "Stipulations or Agreed Statements of Fact and Law," which the Parties jointly submitted to the Court at the Evidentiary Hearing.

did have, she was very frustrated and became more depressed, and her doctor prescribed her Prozac. (*Id.* at 99, 172.) Respondent took Prozac for several years, but stopped when she first became pregnant with Petitioner's child; however, she started taking it again in 2008 before she left Petitioner. (*Id.* at 171-72.) Respondent received incapacity benefits from approximately 2003 until early 2006, when she did not renew the application because she "was fine" and felt she did not need to renew. (*Id.* at 173-74.)

The Parties' description of their relationship is dissimilar. Petitioner claims that although they had normal couple problems, generally they were "very happy together" and had a good relationship. (*Id.* at 13-14, 52, 58.) Although Respondent agrees that they were very happy at the beginning and describes Petitioner as charming, kind, fun, and spontaneous when she initially met him, she testified that after a month of living together, he began to treat her badly, insult her on a regular basis, and be generally very controlling. (*Id.* at 101-04.) Respondent describes a pattern of physical and emotional abuse. She testified that Petitioner tried to kick her in the stomach when she was pregnant, pulled her out of bed one night when she received a wrong number phone call and called her a prostitute, and raped her four times. (*Id.* at 109, 114-17.)[5] In addition, Respondent

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[5] Respondent described one of the rapes at the hearing. According to Respondent, on a night when she had told Petitioner that she did not want to have sexual relations, she awoke to find that her clothes had been removed and Petitioner penetrating her; afterwards, she told Petitioner that he had raped her, and he apologized. (Tr. 114-15.) Peti-

maintains that Petitioner repeatedly told her that she was stupid and useless and that her friends and family hated her, often told her to kill herself, and threatened to take the child away from her. (*Id.* at 110-11, 174.) Petitioner denies ever hitting or raping Respondent, forbidding her from speaking to her family or friends, or pushing her while she was pregnant, and testified that he never insulted, threatened, or raised his voice to Respondent. (*Id.* at 16-17, 59, 62-63, 72). Respondent also testified that Petitioner drank heavily and watched pornography. (*Id.* at 104-05.) In contrast, Petitioner testified that he did not watch pornography (*id.* at 62), and denied that he drank a lot or had ever been so drunk that he did not know what he was doing, although he admitted that he sometimes has drunk about three beers in an evening, (*id.* at 51, 75-76).

In 2006, the Parties obtained a loan, in Respondent's name, to buy a flat in Colombia, but the money was lost when it was transferred to Colombia. (*Id.* at 14-15.) This led to a court case which was not resolved until November 2008. (*Id.* at 15-16.) According to Petitioner, the Parties' relationship started to have problems during this time. (*Id.* at 14-16.) Petitioner also testified that during this time he asked Respondent to find a job to help address their financial problems, but Respondent did not obtain employment. (*Id.* at 16,

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tioner denies that any such conversation took place, and maintains that he never raped Respondent nor attempted to have sex with her while she was asleep. (*Id.* at 64-65.) According to Respondent, the child was also in the room two of the times that Petitioner raped her (*id.* at 116-17), although Petitioner testified that they never had intercourse with the child in the room, (*id.* at 66).

60-61.) Respondent, however, says that she did try to find a job but Petitioner did not want her to work and that she did get a nighttime job as a cleaner between 2006 and 2008 to help pay their debts. (*Id.* at 105-06, 168.)

There is insufficient independent evidence to fully corroborate either Party's version of events. Respondent explains that she did not tell her family or friends about the abuse because she was a very private person and she wanted her family to believe that she was still a successful person. (*Id.* at 103.) Respondent did testify that she told the manager of the child's nursery about Respondent's problems with the Petitioner—and the negative effect Respondent believed this was having on the child—and that the manager referred her to solicitors. (*Id.* at 122.) Respondent also testified that she reported the problems to the police but they declined to become involved in what they termed a custody issue; she also sought help from the Latino American Women's Rights Service ("LAWRS"). (*Id.*)

In May 2009 (when Respondent and the child were living in a shelter, which is explained *infra*), Respondent applied for permanent housing. In connection with this application, the manager of the child's nursery sent an email to the shelter stating that the child had attended the nursery from July to December 2008 and that, during that period, Respondent told the manager that Petitioner "was very controlling and was emotionally abusive towards [Respondent]," including making "derogatory comments" about Respondent in front of the child and other family members and threatening to take the child away from Respondent.

(RX6 at R0036.)[6] The manager also indicated that she "often saw Respondent very upset because of the way [Petitioner] treated her." (*Id.*) Respondent also requested a letter from LAWRS to support her application for permanent accommodation. (RX5 at R0034.) LAWRS submitted a letter, dated May 15, 2009, explaining that in August 2008, Respondent had contacted the organization "to report the domestic violence she was been [sic] subjected to by her then husband" and that she feared for her and her child's safety. (*Id.* at R0035.)[7] The letter states that Respondent was offered an appointment to come and see the domestic violence support and prevention worker at LAWRS, but that Respondent was unable to attend. (*Id.*) Respondent called LAWRS again a few weeks later to report that the situation had worsened and that she needed to move out; after the organization to which she was referred, the Latin Women's Refuge, was unable to assist her, Respondent contacted the police who helped her find first a hotel and eventually a shelter. (*Id.*)

After Respondent left Petitioner and took the child with her, Petitioner attempted to locate Respondent and the child through the United Kingdom court system, as explained in more detail *infra*. As part of these attempts, he submitted disclosure orders to, inter alia, the police station Respondent had contacted when she left. (PX1 at

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[6] "RX" cites refer to the exhibits submitted by Respondent at the Evidentiary Hearing.

[7] Although the letter from LAWRS refers to Respondent's "husband," the Court assumes that Respondent was reporting claims of abuse by Petitioner, her partner at the time.

Petitioner000069.)[8] The response letter submitted by the police indicates that when they interviewed Respondent in 2008, she alleged that Petitioner "had mentally abused her and may have subjected her to sexual assaults during the relationship[;] [s]he had therefore fled their home address and sought accommodation in a refuge." (*Id.* at Petitioner000072.) However, the "[p]olice could not make out any offences from the evidence that [Respondent] gave and were therefore unable to pursue a criminal investigation against [Petitioner]." (*Id.*)

When Respondent moved to New York, she was treated by the therapist who diagnosed her with post-traumatic stress disorder ("PTSD") based on her symptoms, which included heightened startle response, hypervigilance, nightmares, tearfulness, and flashbacks. (Tr. 230-32.) The therapist testified that when she first met Respondent, Respondent was panic-stricken and worried that Petitioner was going to find and harm her and potentially the child, and she seemed in fear for her life. (*Id.* at 231.) PTSD is exhibited by people who experience a traumatic event; in Respondent's case, the therapist based her diagnosis on Respondent's statements that she: "fled her home because she had been sexually assaulted and physically and emotionally abused by her ex-partner;" had been in a shelter for domestic violence in the United Kingdom; and feared that Petitioner would find and harm her. (*Id.* at 232.) According to the therapist, Respondent told the therapist in their

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[8] "PX" cites refer to the exhibits submitted by Petitioner at the Evidentiary Hearing.

early treatment sessions that Petitioner had hit and raped her, although that information did not appear in the therapist's formal notes until December 2010; however, the therapist explains that she often included only symptoms, and not the details of a person's situation, in her notes for confidentiality reasons. (*Id.* at 240-42, 248.) The therapist denies that she did not mention the physical and sexual abuse in her notes because she felt it was unimportant; instead, she maintains that the failure to include it may have been an oversight. (*Id.* at 249.)

The Court finds that Petitioner's claims that he never insulted or mistreated Respondent in any manner are not credible. Although presented in a hearsay format, there is evidence from third parties that Respondent contemporaneously reported that Petitioner was emotionally abusive towards her. Additionally, it is extremely unlikely that Respondent would choose to flee her home with her child, and live in a shelter environment that she described as very unpleasant and stressful, for absolutely no reason. Moreover, the therapist's diagnosis of Respondent with PTSD, and the therapist's description of Respondent's symptoms, also indicate that Respondent suffered trauma. However, there is no evidence, other than Respondent's testimony and the testimony of the therapist and Dr. Cling based on Respondent's self-reporting, that Petitioner physically abused or raped Respondent. Therefore, the Court cannot—and, in light of the Court's conclusion, explained infra, that Respondent has not established that returning the child to London for a custody determination would pose a grave risk to the child,

need not—make more precise findings regarding the abuse that may have occurred.

B. Petitioner's Relationship with the Child

The Parties' first pregnancy resulted in a miscarriage in October 2004, but Respondent became pregnant again in January 2005. (Tr. 107-08.) On October 21, 2005, the subject child was born in London. (Ct. Ex. 1 ¶ A3.) Petitioner and Respondent are listed as parents on the child's birth certificate. (*Id.* ¶¶ A4-5; Pet. Ex. E.) Petitioner, Respondent, and the child all lived together in London from the child's birth until November 19, 2008. (Ct. Ex. 1 ¶ A6.) According to Petitioner, after the child was born, "everything was happiness for everyone." (Tr. 14.) Although he was unable to spend much time with the child on weekdays because of his work schedule, Petitioner believes that he had a very good relationship with the child, and tried to spend whatever free time he had with her. (*Id.* at 17, 74-75.) Petitioner testified that the child laughed and was happy, but acknowledged that the child was not speaking when at the nursery. (*Id.* at 77-79.) In contrast, Respondent testified that while living with Petitioner, the child was very quiet and depressed, did not smile, and would have tantrums. (*Id.* at 120.)

The child began to have a series of problems, including refusing to speak at the nursery, crying a lot, not smiling, having nightmares from which she woke up screaming, bed-wetting, and clinging to Respondent; Respondent testified that in October 2008, she spoke to the child's doctor about these issues because she was very worried. (*Id.* at 127, 176.) The doctor's records state that the child

"talks, laughs and dances in front of parents[ ] but is withdrawn in the nurse[r]y"; the cause was unknown and the nursery wanted Respondent to consult a specialist. (RX1 at R0003.) However, Respondent testified that when Petitioner was not around, the child was talkative and had fun with Respondent but denied that the child laughed and talked in front of Petitioner. When showed the doctor's notes, Respondent stated that she told the doctor the child behaved normally at home but did not specify in front of both parents. (Tr. 176-77.) In the email sent by the nursery manager in connection with Respondent's application for permanent housing, the manager wrote that the home "environment obviously had a negative effect upon [the child] and [she] became an elective mute at the nursery ([she] chose not to speak, although [she] had the language) and became very withdrawn." (RX6 at R0036.) The therapist testified that being withdrawn can be a symptom of trauma. (Tr. 251.)

At the Evidentiary Hearing, Petitioner denied that he and Respondent often argued in front of the child, although he acknowledged that the child was sometimes present in the home during, and thus aware of, these arguments. (*Id.* at 71-72.) Yet, in papers Petitioner submitted in July 2009 in London in connection with his attempts to locate the child, he stated that he and Respondent "would often argue in front of the child[ ]"; however, he "always tried to avoid this so that his [child] would not be distressed." (PX1 at Petitioner000047.) He also indicated that Respondent had mental health issues and that she would "verbally abuse [Petitioner] in front of the child and

call [Petitioner] abusive names" to try and "turn the child against" Petitioner, including telling the child that Petitioner "was evil like the devil," which "resulted in the child pointing to bad objects and calling them Daddy." (*Id.*)

In light of his earlier statements, Petitioner's testimony that he and Respondent never argued in front of the child, and that he "never raise[d] [his] voice to [Respondent] in any argument that [they] had" (Tr. 72), is not credible. Yet, the Court is cognizant of the desire of the Parties to portray themselves in the best light possible and, therefore, does not infer from these statements that Petitioner is incredible with respect to all of his testimony, as Respondent has asserted.

Respondent also claims that Petitioner may have inappropriately touched the child. According to Respondent, when she and the child were living in a domestic violence shelter in London after leaving the Petitioner, the child pointed to her genital area and said that Petitioner had touched her there. (*Id.* at 129-30.) Respondent claims that she reported this to the shelter, but was told that there was nothing she could do because she had no evidence; she did not report it to the police. (*Id.* at 130, 178.) Respondent also describes an incident where Petitioner's mother told Respondent not to let Petitioner bathe the child. (*Id.* at 128-29.)

Respondent also testified that she told the therapist about the child saying that Petitioner had touched her genitals. (*Id.* at 181-82.) Yet, according to the therapist, Respondent said that she did not think that Petitioner would have inappropriately touched or done anything to the child, but she did not know whether he had or not, which

worried Respondent. (*Id.* at 242.) The child never told the therapist that Petitioner touched her but the therapist opined that the child's actions indicated that the child was afraid of Petitioner. According to Respondent, the child has exhibited encropesis (soiling herself with a bowel movement) since the possibility of seeing Petitioner again has been raised, which the therapist explained is often a symptom of terror and trauma; the therapist has not witnessed the encropesis, but believes Respondent's account. (*Id.* at 242-43.) However, in February 2010, the child also told the therapist the she missed Petitioner. (*Id.* at 243-44.) Respondent also told the therapist about two incidents at school where the child said that a female teacher had touched her inappropriately and that a classmate had kissed her, which led to the child being assigned to a new classroom. (*Id.* at 244-45; PX3 at R0108.) Respondent did not mention the possibility that Petitioner had inappropriately touched the child when Respondent relayed these incidents to the therapist. (Tr. 245-46.) For his part, Petitioner denies ever yelling at, hitting, slapping, or inappropriately touching the child. (*Id.* at 70.)

The Court finds that there is insufficient evidence to conclude that Petitioner either sexually or otherwise physically abused the child in any manner. Respondent's account suffers from insufficient corroborating evidence and, indeed, is inconsistent with some other evidence in the record. Given her self-interest in the matter, the Court therefore finds that there is insufficient evi-

dence to support a finding that Petitioner sexually or otherwise abused the child.

C. Respondent Leaves Petitioner with the Child

In November 2008, Respondent came to New York to visit her sister Maria and attempt to gather evidence to support Respondent's and Petitioner's case regarding the problematic loan. (*Id.* at 19, 119, 167-68.) During this time, the child stayed in London with Petitioner and Petitioner's mother who was visiting from Colombia. (*Id.* at 74, 168.) Petitioner claims that when he picked Respondent up at the airport upon her return, Respondent "was a completely different person" than when she left London a week earlier and she demanded that Petitioner and his mother leave their house immediately. (*Id.* at 20-22.)[9] Respondent testified that when she returned from New York, Petitioner and his mother were acting very suspicious and the child was acting fearful and strange around Petitioner; Respondent became extremely scared, and decided to leave. (*Id.* at 134-35.)

On the following day, November 19, 2008, Respondent left to bring the child to nursery school and never returned. (Tr. 22; Ct. Ex. 1 ¶ A7.) Respondent testified that she went to the police station and reported that Petitioner had been abusing her; the police asked Respondent if she

[9] Respondent testified that prior to November 2008 she had asked Petitioner to leave many times but that he always threatened her in response (Tr. 134); Petitioner denied that Respondent ever asked him to move out before November 2008, (*id.* at 85).

wanted to have Petitioner arrested but she declined out of concern for Petitioner's mother and, instead, asked the police to remove Petitioner from their house. (Tr. 135-36.) However, according to Respondent, when she told the police that she did not work and that Petitioner did work, the police said that they could not "do anything for [her]," but they did give her a personal alarm and helped her find a hotel. (*Id.* 136-37.) The next day, Petitioner saw Respondent and the child while he was driving; Respondent ran away. (*Id.* at 23.) Respondent testified that after seeing Petitioner in the car she filed another police report; the police did not do anything for them but sent Respondent and the child to a domestic violence shelter. (*Id.* at 137-39.) Petitioner testified that when he called Respondent after seeing them in the car, Respondent informed him that she had reported him to the police; however, when he went to the station, the police had no records of Petitioner. (*Id.* at 23-24.) Petitioner has not seen the child since.

Petitioner testified that right after Respondent left, he called Respondent's sister Gloria, who lived in London and who denied knowledge of Respondent's whereabouts. (*Id.* at 23.) In December 2008, Respondent's sister Nancy called Petitioner and told him it would be better if he stayed away from Respondent and the child if he didn't "want trouble" or "want to be sorry." (*Id.* at 25-26.) Right after that call, Petitioner received another call from Gloria regarding Respondent's belongings and informing Petitioner that Respondent was living in a refuge and protected by the police. (*Id.* at 26; PX1 at Petitioner000009.) Subse-

quently, Petitioner's solicitors told him to refrain from speaking with any member of Respondent's family. (Tr. 27.)

Respondent and the child resided at a shelter, Croydon Women's Aid, from November 24, 2008, until July 3, 2009. (Ct. Ex. 1 ¶ A8.) Before entering the shelter, Respondent was interviewed by the shelter and submitted forms and a statement describing her claims of abuse. (Tr. 139.) Respondent also signed a license agreement upon entering the shelter. (RX2.) The agreement states that the objective of the organization is to provide "[s]afe emergency temporary accommodation where women and children can find refuge from violence in the home." (*Id.* at R0006.) The length of stay at the shelter was not expected to exceed six months and the original license was from November 24, 2008, until February 23, 2009. (*Id.* at R0005, R0007.) Respondent testified that the shelter was not healthy for her or for the child; therefore, she tried to obtain alternative housing. (Tr. 131-32.) In connection with this attempt, she requested a letter from LAWRS to support her application for permanent accommodation. (RX5 at R0034.) The LAWRS letter describes Respondent's interactions with LAWRS, as discussed *supra*, and states that Respondent wanted a permanent accommodation to start a new life with more stability because the "unsuitable and overcrowded conditions" of the shelter, with other domestic violence victims under a lot of stress, were hindering the development of both Respondent and the child. (*Id.* at R0035.) Respondent testified that before she left Petitioner, she would sometimes go to her sister Gloria's house for the

weekend when Respondent and Petitioner had problems; Gloria had a son about the same age as the child and the child and Gloria's son were friends. (Tr. 174-75.) However, Respondent and the child were only able to see Gloria and her son once while living in the shelter because the shelter did not want Respondent at her family's homes. (*Id.* at 175.)

On July 3, 2009, Respondent and the child left the United Kingdom, traveling first to France and then to New York, where they have lived since July 8, 2009. (Ct. Ex. 1 ¶¶ A12-14).

Petitioner describes a multitude of channels that he pursued in an attempt to find his child and resolve the situation. He contacted the Citizen Advice Bureau in London, where he was referred to Family Mediation; after Family Mediation sent several letters to Respondent without response, Petitioner was referred to solicitors in London. (Tr. 24-25.) On July 23, 2009, Petitioner submitted an application under the Children Act of 1989 (PX1 at Petitioner000030-Petitioner000049), to obtain from a court "a defined contact order to ensure that he obtains regular contact with his [child] and plays an active role in [her] life," (*id.* at Petitioner000037). At the same time, Petitioner submitted orders to disclose the child's whereabouts, under Section 33 of the Family Law Act of 1986, to Respondent's sisters in London, Respondent's previous counsel, the police station that Respondent had contacted, the Child Benefit Office, the child's nursery, and the child's doctor (*id.* at Petitioner000050-Petitioner000067); however, they all denied knowledge of Respondent's and the child's location, (*id.* at Peti-

tioner000068-Petitioner000076). After having "exhausted all possibility that [the child] was still in the [United Kingdom]," on March 15, 2010, Petitioner filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom; the application was sent to the United States Department of State Office of Children's Issues on March 23, 2010. (Tr. 33; Ct. Ex. 1 ¶ A15.) The application details more of the steps that Petitioner undertook to find Respondent and the child and indicates that Petitioner believed that Respondent and the child were in Manhattan. (PX1 at Petitioner000005-Petitioner000009.)[10] At the hearing, Petitioner explained that he thought Respondent would bring the child to the United States at some point but he did not know when or how quickly she would be able to do so; therefore, he wanted to first make sure that Respondent and the child were not in the United Kingdom before taking action pursuant to the Hague Convention. (Tr. 90-91.)

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[10] Petitioner had previously told his solicitors that he believed Respondent was in New York with her sister Maria because Respondent "wasn't very happy in London." (Tr. 27.) On July 23, 2009 (weeks after Respondent and the child had already left the United Kingdom), Petitioner indicated on an application that "when the Parties separated in November 2008, the Respondent threatened to take the child to the USA permanently" because she had siblings in the United States who would be able to support her; thus, Petitioner stated he was worried that Respondent might remove the child from the United Kingdom without his knowledge. (PX1 at Petitioner000048-Petitioner000049.) At the same time, Petitioner also believed that Respondent would possibly return to live in Colombia because she was born there and still had family there. (*Id.* at Petitioner000048.)

D. The Child's Life in New York

Since arriving in New York, Respondent and the child have lived with Respondent's sister Maria, Maria's partner, Respondent's niece (Maria's daughter), and the niece's two-year-old daughter. (*Id.* at 144.)[11] Maria has worked as a nanny for the same family for four years; Maria's partner owns a grocery business. (*Id.* at 144-45, 169.) Maria financially supports Respondent and the child and, in return, Respondent cooks, cleans, and takes care of the children. (*Id.* at 145.) Respondent has not had a job since she came to the United States. (*Id.* at 168.) Because Respondent and the child have British passports, they were allowed to enter the United States without a visa; however, Respondent testified that they are currently over-

In addition, Petitioner stated in his application that he did not have the address of Respondent's sister in New York but did have two contact phone numbers. (*Id.* at Petitioner000005.) However, at the hearing, Petitioner testified that when Respondent visited Maria in November 2008, Respondent left Maria's name, address, and phone number in writing with Petitioner. (Tr. 88.)

[11] Petitioner has expressed concern that Respondent's sister and family members had drug problems because Respondent had told him that the police found cocaine in the garden and that Social Services had been involved. (Tr. 34.) Respondent testified that she had told Petitioner about an incident ten years ago when her niece's boyfriend was incarcerated for selling cocaine. The niece's involvement is unclear because Respondent testified that the niece was not charged, but also that she has a felony in her past. However, Respondent emphasized that neither her niece, nor any other family member, currently has a substance abuse problem. (*Id.* at 149-50.) The Court finds that there is insufficient evidence to determine that anyone residing in the home currently has any involvement with drugs.

stayed, and have been since October 2009. (*Id.* at 165-66.) Respondent testified that she is consulting with immigration authorities about the possibility of being sponsored by Maria, who is a United States citizen. (*Id.* at 150.)

The child has attended the same school since she and Respondent arrived in New York and currently is enrolled in kindergarten; according to Respondent, the child is doing very well in school. (*Id.* at 147.) On the child's 2009-2010 mid-year pre-kindergarten Academic Standards Report, the child's teacher commented that she "is a quiet child who enjoys playing with [her] friends at school[; she] is participating more now and [the school is] encouraging her to write more and develop all skills." (RX10 at R0045.) On the Academic Standards Report at the end of that school year, the teacher wrote that the child "has made a lot of progress socially [and] is beginning to assert herself more[; she] is progressing academically as well." (RX11 at R0048.)

However, in a March 2010 session with the therapist, Respondent expressed concern that the child's school had overreacted to the child's statements regarding the incidents where the child claimed a teacher and student had inappropriately touched and kissed her; the therapist told Respondent that the school might involve Child Protective Services ("CPS") and that Respondent would need to be compliant, to which Respondent agreed. (PX3 at R0108, R0110.) The following week, Respondent told the therapist that she and the child were interviewed by the school but were not contacted by CPS; however, Respondent was still upset with the school. (*Id.* at R0112.)

Respondent testified that the child has friends at school who she sometimes meets at the park or at the library. (Tr. 148.) The child plays with her cousin's two-year old daughter with whom they live, and is close with Maria and Maria's partner. (*Id.* at 148-49.) Respondent also testified that her other niece also lives nearby with her two children and the child spends time with this extended family, particularly on weekends. (*Id.* at 149.) Respondent and the child also attend church on the weekends and the child takes ballet classes. (*Id.* at 150.)

After arriving in New York, Respondent and the child began receiving therapy from a psychiatric social worker at a family medical clinic in July 2009. (*Id.* at 230.) When they first arrived in New York, Respondent testified that the child was very quiet, had nightmares and bed- wetting problems, and became "very sexually talking." (*Id.* at 145-46.) At the hearing, the therapist testified that when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office, which the therapist characterized as "very unusual for a normally developed three-year-old child"; in addition, the child would wet herself, was hypervigilant, and had a very heightened startle response. (*Id.* at 233.) In addition, the therapist's notes from a November 17, 2009 session indicate that the child had been having temper tantrums at home and yelling and slamming doors when she did not get what she wanted; as a result, the therapist sought "to lower [the child's] anxiety when she's separated from her mother and decrease [the child's] aggressive behavior when [her] personal needs are not met." (PX3 at R0095.)

Although the therapist testified that the child showed symptoms of trauma in their initial meeting, she progressed through several diagnoses, including adjustment disorder with anxiety/depression, adjustment disorder with mixed emotional features, adjustment disorder not otherwise specified, undetermined diagnosis, and undiagnosed, before ultimately being diagnosed with PTSD in February 2010; the therapist explained this is often done because a diagnosis such as PTSD can be stigmatizing in children. (Tr. 233-34; PX3 at R0087-R0104.) When asked at the Evidentiary Hearing what traumatic event formed the basis of the PTSD diagnosis, the therapist said it was the child's experience in the United Kingdom before coming to New York, including living in a shelter system, having to move to a new country, and knowing that her mother had been harmed or threatened because, as the therapist explained, being in the presence of abuse is considered trauma to the child, even if the child herself is not abused. (Tr. 234-35.) The therapist declined to say definitively that the traumatic event was witnessing domestic violence, although she said that could cause the trauma. (*Id.* at 239.)

Respondent testified that within six months of arriving in New York, the child's behavior improved. (*Id.* at 146.) The therapist echoed this assessment, describing her as "a completely different child now," who has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy. (*Id.* at 235-36.) In August 2010, Respondent and the therapist decided to terminate therapy because the child

was doing well and agreed that they would return if any of the child's symptoms related to trauma reoccurred. (PX3 at R0120.) In her notes, the therapist indicated that the child was "symptom free, happy, content, [and] normal." (*Id.*)

However, the child resumed therapy in September 2010 when Respondent and the child again met with the therapist because the child was acting out regarding Respondent's new boyfriend. (*Id.* at R0122.) The next week, Respondent informed the therapist that the child was still having problems with wetting herself; the therapist recommended that the child continue therapy until the problem was resolved. (*Id.* at R0124.) By October 25, 2010, Respondent and the therapist agreed that the child was again symptom free; the child was not wetting herself, "reported 'being happy' and was markedly more verbal than during last visits." (*Id.* at R0128.) Accordingly, the child would cease therapy, but return if any problems resumed. (*Id.*) Respondent and the child again resumed meeting with the therapist in December 2010, after the instant Petition was filed. (*Id.* at R0130.) In January 2011, the therapist noted that the child "expressed she is 'happy' in school," was not wetting herself and, when playing with dolls, "talked about how she was happy like the dolls who got to live in the dollhouse with their cousins." (*Id.* at R0134.) Respondent and the therapist determined that the child and Respondent would continue therapy through the duration of the instant proceedings. (*Id.* at R0135.)

E. Possibility of Return to United Kingdom and Expert Evaluations

According to Respondent, when she brings up going back to London, the child says "that she's not going." (Tr. 147.) Respondent testified that when the child is asked if she wants to see Petitioner, she says "no" and, on four occasions after being asked this question, the child has become encropetic. (*Id.*) The therapist testified that when she asked the child about Petitioner, she would remain silent and did not want to talk about him. (*Id.* at 236.) The child also did not talk very much about her time in the United Kingdom in general and did not recall it. (*Id.*) The therapist's February 17, 2010 notes state that the child was able to speak for the first time directly with the therapist about missing her father; the notes from that same session also indicate that the child was much more verbal in play with the therapist (PX3 at R0105), whereas previously she still had been taciturn and communicated by pointing, (*id.* at R0103.)

Although the child had stopped attending therapy by the end of October 2010, Respondent and the child met with the therapist again on December 9, 2010, after the instant Petition had been filed. At this session, the child "stated that she was scared because her 'mommy seemed so worried.'" (*Id.* at R0130.) The therapist's notes from a January 31, 2011 session state that after refraining from asking the child direct questions regarding Petitioner for several months, the therapist did ask the child if she wanted to see her father; the child, outside the presence of Respondent, said

"no." The therapist did not probe the issue further in order to avoid distressing the child. (*Id.* at R0144.)

Respondent's expert Dr. Cling submitted a report and testified at the Evidentiary Hearing based on her examination of Respondent and the child. Dr. Cling testified that during her evaluation, Respondent told her that Petitioner had abused her and that the child witnessed the abuse. Dr. Cling explained that witnessing domestic abuse is "considered to be abuse in and of itself." (Tr. 196.) Dr. Cling did not directly observe any symptoms of trauma in the child, but spoke with the therapist regarding the child's condition when she first arrived in New York. (*Id.* at 204.) When Dr. Cling met with the child, the child stayed with Respondent but was generally willing to talk, moved readily towards the provided toys, and related well. (*Id.* at 197-98.) Dr. Cling testified that when she tried to speak with the child about her time in London or Petitioner, the child "had a very bad reaction"; after initially saying in very short answers that she remembered London and Petitioner, the child said she did not want to talk about it and refused to discuss the subject. (*Id.* at 188-89, 206-07.) Dr. Cling viewed this as the child setting a limit where she felt safe and, therefore, Dr. Cling did not push the child "to an extreme response." (*Id.* at 208.) The child did not wet or soil herself when Dr. Cling brought up Petitioner; however, Dr. Cling stated that such a response "would be psychotic behavior" that even a scared five-year-old would not exhibit unless in "extreme distress." (*Id.* at 207.) When asked about Respondent's testimony that the child had exhib-

ited such a response after being asked about Petitioner and returning to London, Dr. Cling clarified that such behavior would have been surprising in the setting of her interview of the child because Dr. Cling did not push her hard, so the child was in a safe situation. (*Id.* at 207-08.) Dr. Cling testified that if in their meeting the child had been able to speak more about Petitioner—as the child was able to do with Dr. Fraser, when Respondent was not present in the room, as explained *infra*—it "might soften [her opinion in this case] a little." (*Id.* at 211-12.)

Dr. Cling concluded the child was "potentially at risk if she were to be forcibly returned to the [United Kingdom] for custody evaluation of another psychological breakdown" and that such a move "could cause serious psychological harm." (*Id.* at 190.) Removing the child from her "stable environment in the United States . . . might have a catastrophic effect" because, while "it's not generally good to move children, . . . if they have a fragile history, then . . . you want to keep them as stable as possible . . . [and] more or less doing the same thing," particularly because here the child would be taken from her present stable, comfortable environment and returned to the site of the trauma. (*Id.* at 198-99.) This assessment was based on Dr. Cling's discussion with the therapist, who indicated that the child was in "pretty bad shape" and suffering from PTSD when she arrived in New York, as well as Dr. Cling's own observation that the child was now a "normal five-year-old" who is doing very well, "with the exception that there was this difficult psychological area" involving Petitioner and London. (*Id.* at 190-91.)

When asked if there were any arrangements in the United Kingdom that could prevent the child's re-traumatization, Dr. Cling stated that it is "hard to imagine the kind of stable environment that she's already in existing there," particularly because the child has been in New York for over a year and a half at a sensitive age. (*Id.* at 199-200.) However, Dr. Cling did not provide any basis for her belief as to the child's situation in the United Kingdom. When asked by the Court if traumatization would result from moving the child from her current situation to anywhere, as distinct from moving the child to the United Kingdom under arrangements that would allow her to live with people with whom she might be comfortable, Dr. Cling opined that both situations would contribute to the child suffering trauma. (*Id.* at 200-01.) When pressed by Petitioner's counsel, Dr. Cling said she believes it is "very likely" that the child is at risk for another psychological breakdown if returned to the United Kingdom but she cannot predict with certainty what will happen if the child is returned. (*Id.* at 205-06.)

Petitioner's expert Dr. Fraser also submitted a report, based on his psychological evaluation of Respondent and the child, and testified at the Evidentiary Hearing. Dr. Fraser met with Respondent and the child both together and separately. (*Id.* at 283; PX2 at Fraser000001.) Dr. Fraser testified that he met with the child one-on-one in order to observe how the child interacted both with and away from Respondent. (Tr. 283.) Dr. Fraser testified that Respondent seemed very appropriately able to care for the child and was very attuned to her needs. (*Id.* at 260.) Respon-

dent told Dr. Fraser that: Petitioner had raped Respondent four times, twice in the presence of the child; the child had told Respondent in the shelter that Petitioner had touched the child's genitals; and the child had previously exhibited symptoms such as fearfulness, anxiety, emotionally shutting down, refusing to talk, bed-wetting, and clinging to Respondent. (*Id.* at 260-61.) Dr. Fraser testified that the child seemed "to be a very well-adjusted, sweet child," who engaged in very organized, healthy, creative, age-appropriate playing by herself and with Respondent and Dr. Fraser and did not show any distress. (*Id.* at 265-66, 284.) The child told Dr. Fraser that she loves where she lives and that she likes school. (*Id.* at 298; PX2 at Fraser000004.)

Dr. Fraser had Respondent fill out a trauma symptom checklist for young children for the child's trauma symptoms during the past month. (Tr. 261-63.) According to Dr. Fraser, Respondent reported extremely high PTSD avoidance and sexual concern symptoms for the child, which were inconsistent with: (1) Dr. Fraser's own interview with the child, (2) Respondent's description of the child's current condition to Dr. Fraser and Dr. Cling, and (3) Respondent's discussion of the focus of the child's therapy. (*Id.* at 264-65; PX2 at Fraser000005-Fraser000007.) Dr. Fraser opined that this discrepancy "calls into question the accuracy and consistency of [Respondent's] reporting of events," particularly regarding her claims of potential sexual abuse of the child. (PX2 at Fraser000007.) Respondent testified that in filling out the questionnaire, she forgot that it was only supposed to be for the past month and thought it

related to the child's symptoms upon arrival in New York. (Tr. 151-52.) However, the questionnaire responses indicate that Respondent did answer some of the questions with the past-month time frame in mind; for example, she answered "not at all" to the questions of whether the child looked sad or had nightmares, when those were in fact some of the symptoms for which Respondent had sought therapy for the child upon arrival in New York. (PX2 at Fraser000014-Fraser000015.)

Dr. Fraser also had Respondent take a personality test known as the MMPI-2. (Tr. 261.) This test has two components: (1) validity scales, which provide information regarding the subject's test-taking attitude and approach, and (2) clinical scales, which provide information about the individual's personality style and psychiatric symptoms they may be experiencing. (*Id.* at 267-69; PX2 at Fraser000003.) Dr. Fraser testified that Respondent's validity scores indicated that she tended to portray herself in an overly positive light with few shortcomings; people with high scores often "have a difficult time admitting to minor faults that typically most human beings would admit to." (Tr. 281-82.) According to Dr. Fraser, Respondent's "unrealistic claims of personal virtue," "unwilling[ness] to admit faults that might be detrimental to her case," and "extreme level of defensiveness . . . made it difficult to interpret her clinical scores" (PX2 at Fraser000003), and thus called into question the accuracy of the rest of the reported information, (*id.*; Tr. 281-82.) In contrast, Dr. Cling did not administer any written tests to Respondent or the child because Dr. Cling believes that the MMPI-2

is often invalid in custody evaluations because "[p]eople who are undergoing custody evaluations have a very strong, perhaps uncontrollable, urge to present themselves in a very positive light." (Tr. 221.) However, Dr. Cling acknowledges that this test is very often given in custody disputes. (*Id.* at 226.)

Dr. Fraser testified that the child did not exhibit any traumatized or sexualized behavior in his presence, nor did she show any signs of incontinence. (*Id.* at 284-86.) When he brought up Petitioner, the child was able to answer questions regarding her father while continuing to play with a dollhouse and did not seem frightened of her father. (*Id.* at 284-85.) When asked how she feels about being away from Petitioner, the child replied "happy; I'm staying with my mommy." (*Id.* at 297-98.) The child was also able to talk about living in the United Kingdom without being afraid. When Dr. Fraser asked the child if she remembered the United Kingdom with her mother and father, the child said that she played with toys; at that point, she did not want to talk anymore and said she was hungry. (*Id.* at 286.) Dr. Cling categorized the child saying she was hungry as avoidance behavior to get out of talking about Petitioner (*id.* at 225); however, according to Respondent, after speaking with Dr. Fraser, Respondent actually did take the child to McDonald's to get something to eat before returning to Dr. Fraser's office to complete the MMPI-2 questionnaire, (*id.* at 154). Respondent testified that when she took the child to McDonald's, the child did not want to go back to the office and said that Dr. Fraser made her think a toy was her father,

that she killed the toy, and there was "blood all around." (*Id.*) However, Dr. Fraser testified that the child did not identify any of the dolls or toys as representing her father, nor discuss her father in an aggressive way. (*Id.* at 267, 297.)

Dr. Fraser agreed with Dr. Cling that "'it is impossible to say what trauma [the child] was reacting to'" when she exhibited trauma symptoms upon arriving in New York, particularly without investigation into Respondent's claims that Petitioner may have sexually abused the child. (PX2 at Fraser000006.) He believes that several of the child's reported symptoms, such as bed-wetting, excessive clinging to her mother, and avoiding talking about her father, "could also have been reactions to several types of other traumas," such as being uprooted from her home and her father to live in a shelter while in the United Kingdom and then being uprooted from the United Kingdom to move to the United States, still away from her father. (*Id.*) Dr. Fraser acknowledged that given "the level of disruption and stress" in the child's life over the past couple of years, the child "is at increased risk for some degree of psychological maladjustment if she is required to move again; but the potential negative effects depend on many factors." (*Id.* at Fraser000007.) However, he opined that returning to the United Kingdom would not put the child at a grave risk of harm (*id.*), and that, based on his observations of the child, her answers to his questions, and the description of her symptoms from other sources, he did not think that the child would be traumatized, or that it would be a problem, for the child to return to the United Kingdom for the purposes

of conducting a custody hearing. (Tr. 287-88.) In his report, Dr. Fraser did state that if the child was told that returning to the United Kingdom meant going back to her father, she "may react by regressing" and showing previous symptoms; however, Dr. Fraser believes there are "other, more positive ways" to frame moving back to the United Kingdom to the child. (PX2 at Fraser000007; Tr. 304.) When asked if the child would suffer trauma if she was returned to Petitioner, Dr. Fraser cautioned that whenever allegations of abuse have been made, he believes "all efforts need be made to investigate the validity, the accuracy of those allegations prior to returning any child to that home." (Tr. 303.)

II. Conclusions of Law

A. General Principles

The Hague Convention on the Civil Aspects of International Child Abduction, as implemented through ICARA, was created with the stated purpose "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, pmbl., *reprinted in* 51 Fed. Reg. 10,495, at 10,498. The Hague Convention was designed to restore the pre-retention status quo and to discourage parents from crossing international borders in search of a more sympathetic forum. *See Gitter v. Gitter*, 396 F.3d 124, 129-30 (2d Cir. 2005) (citing Paul R. Beaumont &

Peter E. McEleavy, *The Hague Convention on International Child Abduction* 1-3 (1999)). To dissuade family members from removing children to jurisdictions perceived to be more favorable to their custody claims, the Hague Convention attempts "to deprive [their] actions of any practical or juridical consequences." *Id.* at 130 (quoting Elisa Perez-Vera, *Hague Convention on the Civil Aspects of Int'l Child Abduction: Explanatory Report*, ¶ 16, in 3 Acts and Documents of the 14th Session (1982) ("*Perez-Vera Report*")).[12]

A court considering a Hague Convention petition has jurisdiction only over the wrongful removal or retention claim. See Hague Convention, art. 16, *reprinted in* 51 Fed. Reg. 10,495, at 10,500; 42 U.S.C. § 11601(b)(4); *Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001). The merits of any underlying custody claim are of no concern in a Hague Convention case. See *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999) ("*Blondin II*") (citing *Friedrich v.Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*")); see also Hague Convention, art. 19, *reprinted in* 51 Fed. Reg. 10,495, at 10,500. "Put differently, the focus of a court's inquiry in a Hague Convention case is not 'the best interests of the child,' as it typically is in a state custody case; rather it is the specific claims and defenses under the Convention,

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[12] "Perez-Vera served as the official Hague Convention reporter for the Convention and [] her explanatory report is recognized . . . as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." *Blondin v. Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999) (alteration and internal quotation marks omitted).

namely whether a child has been wrongfully removed to, or retained in, a country different from the child's habitual residence and, if so, whether any of the Convention's defenses apply to bar the child's return to his habitual residence." *Hazbun Escaf v. Rodriquez*, 200 F. Supp. 2d 603, 610-11 (E.D. Va. 2002), *aff'd sub nom. Escaf v. Rodriguez*, 52 F. App'x 207 (4th Cir. 2002).

The United States has implemented the provisions of the Hague Convention through ICARA. *See Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010). ICARA allocates the burdens of proof for various claims and defenses under the Convention. *See* 42 U.S.C. §§ 11601-11611; *Koc v. Koc*, 181 F. Supp. 2d 136, 146 (E.D.N.Y. 2001). Specifically, ICARA requires that a petitioner establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A). In this respect, the Convention reflects "a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002). If a petitioner makes out a prima facie case of wrongful removal or retention, the court must return the child unless the respondent can establish one of the Convention's enumerated defenses. *See Hazbun Escaf*, 200 F. Supp. 2d at 611. The presumption favors return because "[r]equiring a return remedy in cases [brought under the Convention] helps deter child abductions and respects the Convention's purpose to prevent harms resulting from abductions." *Abbott*, 130 S. Ct. at 1996. As the Supreme Court has explained, such abductions are traumatic for children and are consid-

ered by some child psychologists to be "one of the worst forms of child abuse"; as a result of an abduction, the child may experience depression, PTSD, identity-formation issues, or other psychological problems, and may be prevented "from forming a relationship with the left-behind parent." *Id.* (internal quotation marks omitted).

To establish a prima facie case of wrongful retention under the Hague Convention, a petitioner must show by a preponderance of the evidence that: (1) the habitual residence of the child immediately before the date of the alleged wrongful retention was in a foreign country; (2) the retention is in breach of custody rights under the foreign country's law; and (3) the petitioner was exercising custody rights at the time of the alleged wrongful retention. *See* 42 U.S.C. § 11603(e)(1)(A); *Gitter*, 396 F.3d at 130-31. If the petitioner satisfies this burden, then the child must be returned to his or her state of habitual residence unless the respondent can establish one of the following affirmative defenses: (1) the proceeding was commenced more than one year after the removal of the child and the child has become settled in his or her new environment (the "settled defense" or "Article 12 defense"); (2) the person seeking return of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; (3) there is a grave risk that the return of the child would expose it to physical or psychological harm (the "grave risk defense"); or (4) the return of the child would not be permitted under the fundamental principles of the requested State relating to the protection of

human rights and fundamental freedoms. *See Blondin II*, 189 F.3d at 245-46. The first two affirmative defenses require proof by a preponderance of the evidence, while the latter two affirmative defenses require clear and convincing evidence. *See id.*

However, as is clear from ICARA, these affirmative defenses are meant to be narrow. *See id.* at 246 (citing 42 U.S.C. § 11601(a)(4)). Indeed, these defenses "do not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent, that remain within the purview of the court with plenary jurisdiction over the question of custody." *Id.*; *see also Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) ("It is not relevant to this Convention exception [the "grave risk defense"] who is the better parent in the long run . . . ."). To view the defenses more broadly would frustrate the core purpose of the Hague Convention—to preserve the status quo and deter parents from seeking custody of their child through, in effect, forum shopping. *See Perez-Vera Report, supra*, ¶ 34.

Moreover, "[e]ven where the respondent meets his or her burden to show that an exception applies, the court may nevertheless exercise discretion to order repatriation." *Matovski v. Matovski*, No. 06-CV-4259, 2007 WL 2600862, at *7 (S.D.N.Y. Aug. 31, 2007); *see also Blondin II*, 189 F.3d at 246 n.4 ("[E]ven where the grounds for one of these 'narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent."); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("*Friedrich II*") ("[A] federal

court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.").

B. The Prima Facie Case of Wrongful Retention

In the instant matter, Petitioner has adequately established a prima facie case of wrongful retention under the Hague Convention. Indeed, as Petitioner points out, Respondent has not attempted to argue otherwise. (Post-Hearing Mem. of Law in Supp. of Pet. for Return of Child ("Pet'r Mem.") 5.)

1. The Habitual Residence

Petitioner can invoke the protection of the Hague Convention only if the subject child is "habitually resident" in a State signatory to the Convention and has been removed to or retained in a different State. *See Holder v. Holder*, 392 F.3d 1009, 1014 (9th Cir. 2004); *Diaz Arboleda v. Arenas*, 311 F. Supp. 2d 336, 341 (E.D.N.Y. 2004). The Hague Convention itself does not provide any definition of "habitually resident." *See Gitter*, 396 F.3d at 131; *Perez-Vera Report, supra* ¶ 53 ("Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms . . . ."). However, its text does direct courts to the time "immediately before the removal or retention." Hague Convention, art. 3, *reprinted in* 51 Fed. Reg. 10,495, at 10,498. In focusing on the pre-retention period, the relevant inquiry is the shared intention of those responsible for fixing the child's place of residence, which typically will be

the child's parents. *See Gitter*, 396 F.3d at 132. However, the Court may also look to other factors in determining the child's habitual residence. *See id.* at 133-34.

Here, the Court concludes that the child was a habitual resident of the United Kingdom.[13] The child resided there from its birth until Respondent and the child left on July 3, 2009; thus, at the time immediately before the removal, the child resided in the United Kingdom.

2. Removal in Breach of Custody Rights Under Foreign Law

Under the Convention, "rights of custody" may arise, inter alia, by operation of law, *see* Hague Convention, art. 3, and "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," *id.*, art. 5(a), *reprinted in* 51 Fed. Reg. 10,495, at 10,498. United Kingdom law provides that "[w]here a child's father and mother were not married to each other at the time of his birth . . . the father shall have parental responsibility for the child if[, inter alia,] he becomes registered as the child's father." Children's Act of 1989, c. 41, § 4(1)(a). Here, Petitioner is listed as the father on the child's birth certificate (Ct. Ex. 1 ¶ A4); accordingly, he has parental responsibility for and custody rights of the child under U.K. law. In addition, U.K. law provides that absent a

[13] Both the United Kingdom and the United States are signatories to the Hague Convention. *See* Hague Convention (Multilateral Treaty) on International Child Abduction Enters into Force on July 1, 1988, 53 Fed. Reg. 23,843 (June 24, 1988).

court order, it is a criminal offense for one parent to take a child under sixteen years old out of the United Kingdom for more than one month without the consent of the other parent. *See* Child Abduction Act 1984, c. 37, §§ 1, 4(b); *see also Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 203 (E.D.N.Y. 2010). Therefore, Respondent's removal of the child to the United States, without Petitioner's consent, breached Petitioner's custody rights.

3. Petitioner was Exercising Custody Rights at the Time of the Removal

Lastly, to establish that Respondent's removal of the child was wrongful, Petitioner must establish that at the time of removal his custody rights "were actually exercised, either jointly or alone, or would have been so exercised but for the removal." Hague Convention, art. 3(b), *reprinted in* 51 Fed. Reg. 10,495, at 10,498. At the time Respondent removed the child from the family home in November 2008, Petitioner was clearly exercising his custody rights, as he lived with and provided financial support and other care for the child. During the seven months between when Respondent removed the child from the home and when Respondent and the child actually left the United Kingdom, Petitioner would have exercised his custody rights if not for Respondent's retention of the child without Petitioner's knowledge of their whereabouts. Respondent has not argued to the contrary.

Accordingly, Petitioner has established a prima facie case of wrongful retention under the Hague Convention.

C. Affirmative Defenses

Because Petitioner has established a prima facie case under the Convention, the child must be returned to the United Kingdom as her place of habitual residence unless Respondent can establish one of four narrow defenses. *See Blondin II*, 189 F.3d at 246. Respondent argues that two defenses apply here—the grave risk defense and the settled defense. (Post-Trial Mem. of Law in Opp'n to Pet. for Return of Child to Pet'r ("Resp't Mem.") 2.) Petitioner asserts that Respondent has failed to establish that either exception applies. (Pet'r Mem. 7.)

1. The Grave Risk Defense

The Convention provides that the Court "is not bound to order the return of the child if the person . . . which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b), *reprinted in* 51 Fed. Reg. 10,495, at 10,499. Respondent must establish this defense by "clear and convincing evidence." 42 U.S.C. § 11603(e)(2)(A). This defense recognizes that "[t]he interest of the child in not being removed from its habitual residence . . . gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001) ("*Blondin IV*") (second alteration in original) (internal quotation marks omitted). However, "[t]he level of risk and danger required to

trigger this exception has consistently been held to be very high." *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000).

The Second Circuit has explained that when the grave risk defense is asserted, a court must determine what type of harm might result from repatriation:

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.

Blondin IV, 238 F.3d at 162. Indeed, Article 13(b) "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, app. C ("State Dep't Legal Analysis") § III(I)(2)(c), 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986). "Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious." *Id.*; *see also Friedrich II*, 78 F.3d at 1069 (holding that the grave risk exception is narrow and should only

apply either: (1) when return would place the child in imminent danger, such as returning the child to a war-zone, place of famine, or site of disease; or (2) in cases of serious abuse or neglect when courts in the home country would be incapable or unwilling to adequately protect the child). For instance, the Department of State has noted that a parent sexually abusing a child would clearly be an example of an "intolerable situation" and, if the other parent removed the child to protect it from further abuse, a court could deny a petition brought by the abusing parent for the child's return because "[s]uch action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm." State Dep't Legal Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510.

The Second Circuit laid out the contours and requirements of the grave risk defense in the case of *Blondin v. Dubois*. The district court had determined that the evidence clearly established that the petitioner father had physically abused the respondent mother, often in the presence of their children, and that he had also beaten one of the children; therefore, returning the children to their father in France would place them at grave risk of physical or psychological harm. *See Blondin v. Dubois*, 19 F. Supp. 2d 123, 127-28 (S.D.N.Y. 1998) ("*Blondin I*"). On appeal, the Second Circuit remanded for consideration of whether any arrangements might mitigate the risk of harm to the children and allow them to safely return to France. *See Blondin II*, 189 F.3d at 248 (stating that "it is important that a court considering an exception under Article 13(b) take into account

any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation"). The Second Circuit emphasized that even if a district court finds a grave risk of harm, it also must consider whether it could protect a child from that harm "while still honoring the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country." *Id.*

On remand, the district court consulted with French and American authorities and child psychology experts and found that there was clear and convincing evidence that returning the children to France, under any arrangement, would expose them to a grave risk of harm. *See Blondin v. Dubois*, 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000) ("*Blondin III*"). The court was presented with expert testimony that while in France, the older child had suffered from a severe traumatic disorder caused by her father's physical and verbal abuse of her and her mother; since coming to the United States, she had significantly, but not fully, recovered. *See id.* at 290-91. Accordingly, the expert believed that "removing the children from [their current] secure environment to return them to France would 'almost certainly' trigger a recurrence of the traumatic stress disorder they suffered in France—i.e. a post-traumatic stress disorder." *Id.* at 291. The court accepted these findings, and concluded that "[a]ny return of [the children] to France, the site of their father's sustained, violent abuse, including even a temporary

one-to- three month return in the custody of their mother, would trigger this post-traumatic stress disorder." *Id.* at 295 (emphasis in original). While the court acknowledged that returning a child is likely to present adjustment concerns in almost every Convention case, it concluded that Blondin differed from the typical case because of the specific evidence of severe abuse suffered by the children, therefore making it far more likely that they would suffer long-term permanent harm if returned. *See id.* at 297. Thus, no measure could mitigate the grave risk of harm because returning to France, by itself, would cause the children psychological harm. *See id.* at 297-98.

On appeal, the Second Circuit held that absent any contravening evidence, it would not disturb the district court's finding that even with all possible mitigating arrangements in place, "the children face an almost certain recurrence of traumatic stress disorder on returning to France because they associate France with their father's abuse and the trauma they suffered as a result"; thus, there was "nothing the French authorities could do to protect the children from the harm they face in this particular situation, because their mere presence in France, the site of their trauma, would create the risk." *Blondin IV*, 238 F.3d at 161.[14] However, the court reiterated that

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[14] The Second Circuit also found that the district court did not err in considering evidence that the children had become well-settled in the United States as a non-dispositive factor in analyzing whether returning them to France would pose a grave risk to their psychological harm, because removing them from their current safe environment where they had begun to recover from their trauma would add to

"[i]n cases of serious abuse, before a [district] court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make possible the safe return of a child to the home country." *Id.* at 163 n.11.

Applying these standards after *Blondin*, district courts within the Second Circuit that have denied repatriation under the grave risk exception have done so in cases involving very serious abuse. *See, e.g., Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 408-09 (E.D.N.Y. 2005) (denying repatriation because the petitioner had physically abused the respondent and the children and had repeatedly threatened the respondent and her family since the respondent came to the United States, and there was uncontroverted expert testimony that the children would suffer relapse of their PTSD symptoms by merely returning to Israel, even if they had no contact with the petitioner); *Reyes Olguin v. Cruz Santana*, No. 03-CV-6299, 2005 WL 67094, at *2-4, *11-12 (E.D.N.Y. Jan. 13, 2005) (denying petition to order return of children to Mexico because the record showed that the petitioner frequently and viciously beat the respondent in front of the children, the children told a psychiatrist that their father hit them as well, and there was uncontroverted expert testimony that a return to Mexico would exacerbate the PTSD suffered by the older child).[15]

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the harm they would suffer upon returning to the site of the original trauma. *See Blondin IV*, 238 F.3d at 165.

[15] Courts outside the Second Circuit have also applied a high threshold to the grave risk exception, finding that the defense was established in situations of extreme physical

However, the Second Circuit cautioned that its decision in *Blondin* "by no means implies that a court must refuse to send a child back to its home country in any case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm"; instead, a court must look at the "specific facts presented in th[e] case" at issue. *Blondin IV*, 238 F.3d at 163 n.12 (emphasis in original). And, in fact, several courts within the Second Circuit have granted a petition for return despite some evidence of abuse. *See, e.g., Rial v. Rijo*, No. 10-CV-1578, 2010 WL 1643995, at *2-3 (S.D.N.Y. Apr. 23, 2010) (ordering the return of the child to Spain, despite evidence that the petitioner was verbally and sometimes physically abusive to the respondent, including at times in front of the child, because the court concluded that the risk of harm to the child was not grave if the child returned with the respondent, and the petitioner agreed to rent an

abuse. *See, e.g., Van De Sande v. Van De Sande*, 431 F.3d 567, 569-70 (7th Cir. 2005) (reversing repatriation order where the petitioner had severely and repeatedly beaten respondent in front of their children and threatened to kill the children); *Danaipour v. McLarey*, 386 F.3d 289, 301-03 (1st Cir. 2004) (affirming district court's refusal to return children where there was clear and convincing evidence that the petitioner sexually abused one child and that both children would suffer psychological harm if returned to Sweden); *Walsh v. Walsh*, 221 F.3d 204, 219-21 (1st Cir. 2000) (reversing repatriation order where petitioner severely beat respondent in front of children and undertakings would be insufficient because petitioner had a history of disobeying court orders); *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (denying petition for return where petitioner belt-whipped, punched, and kicked the child, and choked and broke the respondent's nose).

apartment and provide financial support for the respondent and the child until a Spanish court determined custody and support); *Lachman v. Lachman*, No. 08-CV-4363, 2008 WL 5054198, at *9 (E.D.N.Y. Nov. 21, 2008) (concluding that evidence that the petitioner previously had been arrested, but found not guilty, on domestic abuse charges in England was insufficient to establish that returning the child to England would pose a grave risk of harm to the child, where there was no evidence that the petitioner had ever harmed the child); *Laguna v. Avila*, No. 07-CV-5136, 2008 WL 1986253, at *8-9 (E.D.N.Y. May 7, 2008) (concluding that there was insufficient evidence to establish that the child would be at grave risk if returned to Colombia, where the petitioner had been violent to the respondent but there was no evidence that the petitioner physically abused the child).

Moreover, "[i]n th[e] [Second] Circuit, . . . even incontrovertible proof of a risk of harm will not satisfy the Article 13(b) exception if the risk of harm proven lacks gravity." *Laguna*, 2008 WL 1986253, at *8 (citing *Blondin IV*, 238 F.3d at 162). "Courts have recognized that a child's observation of spousal abuse is relevant to the grave-risk inquiry . . .[, as is] [a] parent's general pattern of violence." *Elyashiv*, 353 F. Supp. 2d at 408; *see also Rial*, 2010 WL 1643995, at *2 ("Prior spousal abuse, though not directed at the child, can support the grave risk of harm defense."). However, courts that have invoked the grave risk exception "have focused on evidence of a sustained pattern of physical abuse and/or a propensity for violent abuse[, whereas] [e]vidence of sporadic or isolated

incidents of abuse, or of some limited incidents aimed at persons other than the child at issue, have not been found sufficient to support application of the 'grave risk' exception." *Laguna*, 2008 WL 1986253, at *8 (citation omitted).

Applying these principles to the present case, Respondent must establish by clear and convincing evidence that the child would be exposed to a grave risk of harm if returned to the United Kingdom. However, "subsidiary facts need only be proven by a preponderance of the evidence." *Elyashiv*, 353 F. Supp. 2d at 404 (alteration and internal quotation marks omitted). As noted *supra* in the Findings of Fact section, the Court finds that a preponderance of the evidence indicates that Petitioner engaged in emotionally abusive conduct towards Respondent. Although Respondent may not have proven that Petitioner made all the statements that she attributed to him (in terms of both frequency and content), Petitioner's claim that he never mistreated Respondent through any verbal abuse is simply not credible in light of: (1) the supporting evidence that Respondent had contemporaneously mentioned the psychological abuse to other people in the United Kingdom; (2) Respondent's actions in fleeing to the domestic abuse shelter, which the Court finds that a person would not do for no reason whatsoever; and (3) Respondent's PTSD diagnosis upon arriving in New York.

However, the Court is presented with much less evidence regarding any physical abuse by Petitioner; these allegations are less specific and much less corroborated by additional evidence. Indeed, the only references to physical abuse prior

to the initiation of these proceedings are statements Respondent allegedly made to the therapist; however, the therapist's contemporaneous notes do not mention physical abuse and her explanation for its absence was not sufficiently persuasive to establish that any such abuse had occurred. And, the evidence is entirely insufficient to find that Petitioner abused the child physically, sexually, or psychologically. Although the therapist testified that the child clearly showed signs of trauma when they first met, the therapist was unable to pinpoint the source of that trauma. Before arriving in New York, the child frequently witnessed her parents argue, fled her home with no warning, ceased contact with her father, her grandmother, and her mother's family with whom she often spent time, and lived for seven months in a shelter that Respondent described as very stressful and unpleasant. Thus, there is reason to believe that, whether in combination or in isolation, the time the child spent at the shelter, as well as being uprooted from her life in the United Kingdom, certainly could have been the cause, or the primary cause, of the trauma that the child was suffering upon her arrival in the United States. The Court therefore agrees with Dr. Fraser's conclusion that based on the record before the Court, it is impossible to determine, by even a preponderance of the evidence, that the child's trauma was caused by anything Petitioner did to the child. *Cf. Reyes Olguin*, 2005 WL 67094, at *7 (rejecting the petitioner's suggestion that the child's PTSD may have been caused by something other than the abuse, such as separation from his father and the escape to the United States,

because the expert "ruled out any other source for the PTSD except for [the petitioner's] violent behavior").

Moreover, the courts that determined that the Article 13(b) exception applied have done so when presented with uncontroverted expert testimony and other credible evidence that the child would face grave risk if returned. For example, in *Blondin*, the only expert testified that a return to France would almost certainly trigger the child's PTSD; the Second Circuit held that "[a] grave risk of psychological harm, even construed narrowly, undoubtedly encompasses an almost certain recurrence of traumatic stress disorder." *Blondin IV*, 238 F.3d at 163 (alterations and internal quotation marks omitted). Here, Dr. Cling testified that removing the child from her stable United States environment could have a "catastrophic effect" and that the child would very likely be at risk for another psychological breakdown. In contrast, Dr. Fraser agreed that the child should not be returned to her father's custody without further investigation (as he believes is true in any case involving abuse allegations), but testified that if the move was properly framed to the child, the child could return to the United Kingdom with her mother for a custody evaluation without suffering trauma or being at grave risk of harm.

The Court therefore agrees with Petitioner that Respondent has failed to carry her burden of establishing by clear and convincing evidence that returning to the United Kingdom would pose a grave risk of harm to the child. There is simply insufficient evidence that merely returning to the United Kingdom—even if that country was the

site of some of the child's trauma, whether caused by the child witnessing Petitioner's abuse of Respondent or by being in the shelter—in and of itself would present a grave risk. By all accounts the child is doing quite well now; in fact, she had stopped therapy because it was determined that it was no longer needed. Respondent has two sisters in the United Kingdom with whom the child had spent time prior to leaving that country. In his post-trial memorandum and at the Oral Argument, Petitioner suggested several undertakings that could help ensure the child's safe transition to the United Kingdom. Petitioner is not suggesting that either the Respondent or the child would live with him in London and he in fact represented that he would not want to have any contact with Respondent outside the courtroom. Moreover, there is no evidence that Petitioner would not comply with any court orders that would allow for, or require, such arrangements. Petitioner made use of the United Kingdom's legal system to try and locate the child. Given the narrowness of this exception, and the presumption of the Hague Convention in favor of returning the child, the Court concludes that there is insufficient evidence to support the application of the grave risk defense in this case.

2. The Settled Defense

The Convention provides that where a period of more than one year has elapsed between the dates of the wrongful removal of the child and "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is," the judicial or admin-

istrative authority "shall [ ] order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12, *reprinted in* 51 Fed. Reg. 10,495, 10,499. For this defense to apply, Respondent must persuade the Court, by a preponderance of the evidence, that the child should not be returned to the United Kingdom because the child has been in New York for more than one year and has become settled. *See* 42 U.S.C. § 11603(e)(2)(B). Article 12 does not define "settled" or state how this defense is to be proved, but the burden falls upon the party opposing the return of the child to establish the defense, while at the same time, preserving the discretionary power of a court to determine whether or not the defense justifies refusing to repatriate the child. *See Perez-Vera Report, supra*, ¶ 109.

"To the extent that Article 12 permits [a] court[ ] . . . to deny repatriation on this basis, it effectively allows [the court] to reach the underlying custody dispute, a matter which is generally outside the scope of the Convention." *Blondin IV*, 238 F.3d at 164. "Although there is nothing magical about one year, its basic purpose is designed to serve the best interests of the child . . . ." *In re Robinson*, 983 F. Supp. 1339, 1345 (D. Colo. 1997) (footnote omitted). Thus, although the Convention's aim is to return the child without considering the custody merits, the Convention realized that at some point, a child may become so settled in his or her new country that repatriation might no longer be in the child's best interests. However, given the Convention's underlying goals, "nothing less than substantial evidence of the child's sig-

nificant connections to the new country is intended to suffice to meet the respondent's burden of proof." State Dep't Legal Analysis § III(I)(1)(c), 51 Fed. Reg. at 10,509. In addition, the Court must also consider evidence concerning the child's contacts with and other ties to her State of habitual residence, in this case the United Kingdom. *See id.*

In discussing the selection of the one-year period, the Convention's Reporter explained that "the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard." *Perez-Vera Report, supra*, ¶ 107. The Convention acknowledged the potential difficulties in establishing a child's whereabouts but concluded that a "single time-limit of one year" was the best option. *Id.* ¶ 108. The date is measured based on when proceedings under the Hague Convention were commenced. *See id.*[16]

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[16] In his Memorandum of Law, Petitioner also points out that he filed his ICARA application in March 2010, well less than a year after Respondent and the child left the United Kingdom. (Pet'r Mem. 19.) However, the date of the filing of the application is irrelevant; the one-year period is measured from when the Petition was actually filed in this Court. *See Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) ("The petition must be filed with the court of record, not the Central Authority, to file within the one-year [period]."); *Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (noting that courts "have uniformly held that the filing of a petition in the courts 'commences' the judicial proceedings under the Convention," not applying to a Central Authority (emphasis in original)).

a. Equitable Tolling

In the instant case, the Petition was filed more than a year after the wrongful removal of the child. The child was removed from the United Kingdom in July 2009 and Petitioner did not file his Petition in this Court until November 10, 2010. However, Petitioner asserts that the one-year period should be equitably tolled because Respondent concealed the whereabouts of the child from Petitioner, preventing him from timely filing his Petition. Accordingly, Petitioner maintains that the Article 12 defense is not available to Respondent and that the Court must order the child's return.

Neither the Hague Convention nor ICARA mention equitable tolling, and the Second Circuit has not considered whether the one-year period in Article 12 may be tolled. However, a number of courts outside the Second Circuit have applied equitable tolling, concluding that refusing to toll the one-year period would create incentives for abducting parents to conceal the child's whereabouts until after one year had lapsed and thus reward the behavior the Convention seeks to prevent. *See, e.g., In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) ("[A] court may equitably toll the one-year period where . . . (1) the abducting parent concealed the child and (2) that concealment caused the petitioning parent's filing delay."); *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (concluding that "applying equitable principles to toll the one-year filing period in circumstances where the abducting parent hides the child is consistent with the purpose of the

Convention to deter child abduction" because, although there are "serious concerns with uprooting a child who is well settled regardless of whether the abducting parent hid the child," giving an affirmative defense to parents for hiding a child would encourage both child abductions and hiding children from parents seeking return); *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) ("[E]quitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return."); *Wasniewski v. Grzelak-Johannsen*, No. 06-CV-2548, 2007 WL 2071957, at *6 (N.D. Ohio July 13, 2007) (weighing concern for "rewarding an abductor for concealing a child long enough for the child to become 'well-settled'" against the harm "associated with a 'second removal,' uprooting the child from the place to which he now has developed ties," and concluding that "[a]lthough not a statute of limitations, Article 12's proscribed time frame should not be considered" where a parent absconds with the child "without prior notice or post-abduction contact"); *Belay v. Getachew*, 272 F. Supp. 2d 553, 563 (D. Md. 2003) (concluding that although "Article 12 may not be a statute of limitations per se, it should be subject to some form of equitable tolling" because "where the actions of the abductor in concealing the child may have abetted the child in forming roots in the new country, [courts] must have the flexibility to take into account those actions in determining the outcome of the case under Article 12"); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) ("If equitable tolling does not apply to

ICARA and the Hague Convention, a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available.").[17]

However, the only court within the Second Circuit to consider this issue determined that equitable tolling does not apply to the Article 12 settled defense. *See Matovski*, 2007 WL 2600862, at *11. The *Matovski* court concluded that "the one-year period in Article 12 is not a limitations period, nor is it analogous to a limitations period [because] . . . '[a] petition for return of the child *is not barred if it is filed over one year from the date of removal*.'" *Id.* at *12 (quoting *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002)) (emphasis in *Matovski*). Instead, the *Matovski* court concluded that the settled defense "is a recognition that, after the passage of a sufficient period of time, the child's interests in remaining in an established environment may be superior to the interest of the petitioning parent [and thus,] [e]quitable tolling, if accepted, would place the interests of the petitioning parent above those of the potentially settled child simply because the petitioner may have had good reason for failing to

[17] Some of these courts have also noted that limitation periods are usually subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. *See, e.g., Duarte*, 526 F.3d at 570 ("'It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle.'" (quoting *Young v. United States*, 535 U.S. 43, 49-50 (2002))); *Furnes*, 362 F.3d at 723 (same).

file sooner." *Id.* Therefore, in the court's view, "[e]quitable tolling would be inconsistent with the Convention's careful balancing of interests" and, therefore, concluded that it does not apply to Article 12. *Id.*

A few other courts, although far less than the majority, have agreed. *See, e.g.*, *Anderson*, 250 F. Supp. 2d at 875 ("[T]he drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child's return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts."); *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998) ("The language of the Convention is unambiguous, measuring the one-year period from the date of the wrongful retention. It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provision is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitation does, but rather to put some limit on the uprooting of a settled child." (alteration, citation, and internal quotation marks omitted)), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999).

The Court agrees with the conclusion reached in *Matovski*. The one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling. A petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located. It is clear, from both the wording of Article 12 and the *Perez-Vera Report*, that the purpose of the settled defense is not to give petitioners a reasonable amount of time in which to bring their claims, as is the function of most statutes of limitations. Instead, the purpose is to take into account that if the child has become settled, its interests have to be weighed. And the Convention decided that after one year had passed, the child's interests would almost presumptively carry more weight than the interest of a petitioner.

The Court acknowledges that in some respects, this seems to be inconsistent with the goals of the Convention because, of course, there is a concern that this defense could reward or encourage abducting parents to hide their children from the other parent in such a way, and for a sufficient length of time, that the children are allowed to become settled. However, presumably the drafters of this exception were aware of that concern and, nevertheless, balanced the competing interests at stake and decided to include a defense providing for the reality that even if a child is wrongfully removed, after a certain amount of time has passed, it could be too harmful to a child to order that he or she be removed once again. They could

have chosen a longer length of time, but, for whatever reason, they decided on one year.

Moreover, the Convention does provide a mechanism to account for the principles underlying the equitable tolling argument—the court's discretion. As the Second Circuit has explained, "if more than one year has passed, a demonstration that the child is now settled in its new environment may be a *sufficient* ground for refusing to order repatriation." *Blondin IV*, 238 F.3d at 164 (emphasis in original). But, a court is not required to return a settled child. *See Blondin II*, 189 F.3d at 246 n.4 (noting that even if a defense has been established, "the district court is not necessarily bound to allow the child to remain with the abducting parent"); *see also Matovski*, 2007 WL 2600862, at *12 ("Because the denial of a petition pursuant to Article 12 is discretionary, equitable tolling is unnecessary to deter an abductor from concealing the whereabouts of a wrongfully removed or retained child."). A court may take into consideration efforts by the abducting parent to conceal the child, or by the searching parent to find the child, in determining whether to repatriate the child even though the child was deemed to be settled. While the Convention and ICARA do not mention equitable tolling, the Department of State, in its public notice explaining the Convention, did state:

> The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating

> a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

State Dep't Legal Analysis § III(I)(1)(c), 51 Fed. Reg. at 10,509. The courts that have tolled the one-year period have cited this passage as evidence that equitable tolling should apply to petitions brought under the Convention. *See, e.g., Duarte,* 526 F.3d at 570. However, the Court believes that instead of turning the Article 12 one-year period into something that it was not intended to be—a statute of limitations—concealment of a child is simply one factor for the Court to consider in making its ultimate determination.

In any event, even if equitable tolling could apply to Convention petitions, the Court does not believe that tolling would be warranted in this case. The record makes clear that Petitioner made certain efforts to locate the child using the United Kingdom's legal system. He was uncertain that the child was in the United States, or had even left the United Kingdom, until well after Respondent and the child were living in New York; although Petitioner suspected that Respondent might come to her sister in New York, he also contemporaneously indicated that Respondent might have taken the child to Colombia. And, Petitioner testified that he wanted to make absolutely sure that the child was not in the United Kingdom before bringing this Petition.

Yet, it remains the case that Respondent took the child to her sister Maria in New York, the same sister that Respondent had visited immediately before leaving Petitioner in November 2008. At the Evidentiary Hearing, Petitioner testified that when Respondent took that trip to New York, she gave him the phone number and address of where she would be staying.[18] Petitioner emphasizes that he did not call Maria because he was following the legal advice of his solicitors not to contact Respondent or her family and that Respondent's family in London had told him to stay away if he did not want trouble. While Petitioner's attempts to follow the proper legal channels are laudable, there is no reason why his solicitors could not have contacted Maria in New York to see if Respondent and the child were there, as they contacted Respondent's family in London. Petitioner had reason to believe that this very location might be one of the places to which Respondent would bring the child and had contact information; accordingly, his failure to file the Petition until November 2010 is not excused.

At the Oral Argument, Petitioner's counsel proposed February 22, 2010, as the date that Petitioner knew that the child was probably in New York. (Oral Arg. Tr. 11.) In his Memorandum of Law, Petitioner also asserts that he could not file his Petition until November 2010 because he was unable to obtain legal counsel in the United States

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[18] As previously noted, in the disclosure applications Petitioner submitted in the United Kingdom, he indicated that he only had the sister's phone number in New York, and not her address. Regardless, he did have some contact information for the sister in New York.

until that time. (Pet'r Mem. 19.) The Court recognizes that Petitioner's difficulty in obtaining counsel to submit his Petition is unfortunate and might explain part of the delay, but reiterates that the purpose of the Article 12 exception is not to serve as a limitation period; instead, the exception focuses on the importance of the interest of the child who is now settled in the new environment. Therefore, although the delay in filing the Petition may not be entirely Petitioner's fault, the Court cannot conclude that his efforts to locate the child and bring the Petition within the one-year period outweigh the interests of the child, if the child is deemed to be settled in New York.

Moreover, although Respondent did not tell Petitioner where she and the child were—and admittedly did not want him to find them—she also did not conceal the child to an extent that would warrant equitable tolling, if it was available. In this case, unlike many of the cases where equitable tolling was applied, Respondent did not go to a place that Petitioner could not have imagined she would go, nor did she move the child from one location to another or take other steps to remain hidden. *Cf. Mendez Lynch*, 220 F. Supp. 2d at 1363. Instead, Respondent took the child to New York to live with the same sister that Respondent had visited in November 2008, right before leaving Petitioner. Upon arriving in New York, Respondent enrolled the child in school, did not change either her or the child's names, and has stayed in the same place. Thus, Respondent

simply has not engaged in egregious conduct to ensure that Petitioner could not find the child.[19]

b. The Merits of the Settled Defense

Therefore, because the child had been in New York for approximately sixteen months at the time the Petition was filed, the Court must consider whether the child has become settled in her new environment. To establish the merits of this exception, Respondent "must show by a preponderance of the evidence that the child is in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects." *Koc*, 181 F. Supp. 2d at 152 (internal quotation marks omitted); *see also Matovski*, 2007 WL 2600862, at *13 ("Respondent must marshal substantial evidence of the child's significant connections to New York." (internal quotation marks omitted)). Among the factors that courts have considered in determining whether or not a child has become settled are: "the age of the child[;] the stability of the child's residence in the new environment[;] whether the child attends school or day care consistently[;] whether the child attends church [or other religious institutions] regularly[;] the stability of the mother's employment[;] and whether the child has friends

[19] There is evidence in the record, particularly in the therapist's notes from Respondent's early sessions, that Respondent was concerned that Petitioner would find out where she and the child were living and considered hiding. (PX3 at R0066, R0068-R0070, R0077.) But, she did not; she stayed living with the very sister that she knew that Petitioner knew she had previously visited and could have gone to stay with when she left the United Kingdom.

and relatives in the new area." *Koc* 181 F. Supp. 2d at 152; *see also Matovski*, 2007 WL 2600862, at *13 (same); *Reyes Olguin*, 2005 WL 67094, at *8 (same).

Here, a number of these factors support a finding that the child is now settled, and there are some that do not. As Petitioner pointed out during the Oral Argument, most of the evidence on this issue came from Respondent herself and, to a lesser extent, from the therapist and from the child's school records that were submitted into evidence. However, Respondent is correct that much of the evidence of the child's connections to her new environment is undisputed. It is true that Petitioner himself is not in a position to contradict the evidence, as he has not seen or spoken to the child since she moved to New York, but the Court does not believe there is any reason to doubt its veracity.

At the time Petitioner initiated this action, by all indications, the child had been living in one place for sixteen months, which is a long period of time in the life of a five-year-old. Since they arrived in New York, Respondent and the child have lived in the same location with Respondent's sister, the sister's partner, Respondent's niece, and the niece's daughter; the child has become close to this family, and also sees other extended family who live nearby on the weekends. Her school records show that she was enrolled in pre-kindergarten last year, and currently attends kindergarten at the same school. The child's pre-kindergarten report cards state that she was progressing socially and academically. Petitioner points out that the child missed fourteen days of

school in her first semester, but young children can often get sick and miss a lot of school; the absences do not lead to a conclusion that the child is not settled. Respondent testified that the child has made friends at school with whom she sometimes plays after school and meets at the park or library, goes to ballet class, and attends church. Both experts testified that Respondent appropriately cares for the child, and the child told Dr. Fraser that she loves where she lives and is happy here in New York. The therapist also testified that the child has improved dramatically since she began seeing her and seems to be doing very well here in her current environment.[20]

However, Respondent is unemployed and she and the child are entirely dependent on Respondent's sister Maria and Maria's partner for financial support. In *Matovski*, the court concluded, in similar circumstances to here, that the mother's inconsistent employment history was not a major factor because the children and mother were financially supported by the children's grandparents, with whom the children and mother lived, rendering their overall financial stability "reasonably assured." *Matovski*, 2007 WL 2600862, at *14 (determining that overall, there was "substantial, persuasive evidence" that the children had significant connections to their new environment because they had lived in the same home since arriving in New York, consistently attended

[20] Petitioner argues that the child's current residence is not stable because of potential drug issues (Pet'r Mem. 20); however, as noted *supra*, the Court finds there is no evidence indicating that anyone living in the house, or anyone the child is in contact with, currently has a drug problem.

school and activities with the same classmates, socialized and played with many friends, and were attached to their large extended family in New York). In contrast, in *Koc*, the court viewed the mother and child's financial dependence on the mother's parents as a negative factor, *see Koc*, 181 F. Supp. 2d at 154, but there they also received support from public services, *see id.*, and had only lived with the child's grandparents for the first three months of the twenty-seven months that they had been living in New York prior to the filing of the petition, *see id.* at 140-41. Under the circumstances presented in the instant case, the Court finds that there is nothing to suggest that the financial and other support that the child and Respondent are receiving from Maria's family is in jeopardy, or is unlikely to continue for the foreseeable future.

At the Oral Argument, Petitioner, while acknowledging that a five-year-old can be well settled, argued that it is harder for a young child to build the same types of connections as an older child and asserted that Respondent had not presented enough evidence of connections. While the child is only five years old, she is old enough to form attachments, but also young enough that her involvement in extracurricular and community activities is somewhat limited. However, there is uncontroverted testimony that the child has made friends and is engaged in some activities. Indeed, a number of courts have found that children of similar ages to the child here were settled in very similar factual circumstances. *See Edoho v. Edoho*, No. 10-CV-1881, 2010 WL 3257480, at *6 (S.D. Tex. Aug. 17, 2010) (concluding that four-

and six-year-old children were settled where they had lived in Houston for almost two years, had significant contact with extended family who lived close by, participated in activities, attended church and Sunday school, and the older child was enrolled in school, even though respondent was unemployed but looking for employment); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (determining that three-year-old child was settled where she was performing at two to three age levels above her own, was well-liked and had a core group of friends, often attended community cultural events, and had many relatives in the region); *Zuker v. Andrews*, 2 F. Supp. 2d 134, 141 (D. Mass. 1998) (explaining that four-year-old child was settled because he had attended the same daycare center for over a year even though he had moved once, the center's director said that the child had thrived academically and socially, he had relationships with teachers and children, attended birthday parties and play dates at his home and friends' homes, saw his grandmother often, and no contrary evidence was introduced); *Robinson*, 983 F. Supp. at 1346 (finding that there was significant, undisputed evidence that children ages five and ten were settled in their new environment where they had lived in the same area for twenty-two months, had relationships with the respondent's extended family, were doing well in school and had made friends, and were involved in extracurricular activities).

There is also some concern as to the immigration status of Respondent and the child. They have both overstayed their visas and thus are not legally in the United States. In *Koc*, the court, in

determining that the child was not settled, took into account that she and her mother had overstayed their visas and were in the country illegally, which the court noted would make it virtually impossible for the child to see her father if she remained in the country. *See Koc*, 181 F. Supp. 2d at 154. However, the Ninth Circuit has rejected the idea that immigration status should render an otherwise settled child not settled, concluding that immigration status should only be a significant factor in the settled analysis if there is an immediate, concrete threat of deportation. *See B. del C.S.B.*, 559 F.3d at 1010-14. Here, there is no indication that Respondent and the child face an imminent, or any, threat of deportation, and there is unrefuted testimony from Respondent that she is looking into methods to gain legal status, including having her sister Maria, who is a United States citizen, sponsor Respondent and the child for citizenship. There is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York.

It is true that the child's life is not perfect. Although the child has, by all accounts, vastly improved through therapy, she still has some struggles, including a recurrence of wetting herself and having tantrums. The therapist's notes indicate that in the fall of 2010, the child had difficulties regarding her mother's new boyfriend (PX3 at R0122), although no mention was made of this relationship at the Evidentiary Hearing. The child also apparently had two issues at school where she claimed a teacher and another student

had kissed and inappropriately touched her; following these incidents, Respondent was unhappy with the school's response.

However, the child's life does not have to perfect for her to be settled. Viewing the totality of the circumstances, the description of the child's life, as presented to the Court, suggests stability in her family, educational, social, and most importantly, home life. Courts that have found that a child was not settled have tended to do so in cases where, unlike here, a child has moved frequently and therefore not had a stable living situation. *See, e.g., Lutman v. Lutman*, No. 10-CV-1504, 2010 WL 3398985, at *5-6 (M.D. Pa. Aug. 26, 2010) (declining to find that nine-year-old child was settled despite evidence that he was doing well in school because the child had resided in three different locations and attended three different schools in the two years since he was wrongfully retained, had far more family in Israel than in the United States, had a limited network of friends, did not engage in extracurricular or community activities, and the respondent father had been with his current employer for only fifteen months and had a history of financial and employment instability); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1282-83 (N.D. Ga. 2004) (ten-year-old child who had lived in the United States for two-and-a-half years was not well settled despite regularly attending and performing well in school, participating in extracurricular activities, and having friends because, since arriving, she had moved three times, attended three different schools, had almost no family in the United States, and was here illegally); *In re Ahumada Cabrera*, 323 F.

Supp. 2d 1303, 1313-15 (S.D. Fla. 2004) (nine-year-old child was not settled even though she had lived in the United States for two-and-a-half years, consistently attended and performed well in school, played soccer, and had friends, because she had changed residences five times and schools once, had only her mother and her aunt in the United States, could be deported, and was subject to her mother's uncertain immigration status and employment prospects); *Koc*, 181 F. Supp. 2d at 153-55 (finding that eight-year-old child was not settled because she had lived in three locations and attended three different schools in the two-and-a-half years she had been in the United States, did not regularly participate in extracurricular school or religious activities, did not socialize with school friends outside of class or have friends in the neighborhood, had many friends and family back in Poland, and had uncertain immigration status and financial support, although she was doing well in school and saw some family in the area).

After considering all of these factors, the Court concludes that the preponderance of the evidence demonstrates that the child is settled in her current environment. To uproot her once again would be extremely disruptive; she has reached the "point at which [she has] become so settled in [her] new environment that repatriation [is] not . . . in [her] best interest." *Blondin IV*, 238 F.3d at 164. Accordingly, the Court finds that the elements of the Article 12 defense have been met.

D. Discretion

As already noted, a finding that the child is settled does not end the analysis. The Court must consider whether to exercise its discretion and repatriate the child even though she is now settled in New York. Thus, the Court has considered the points discussed earlier regarding the efforts of Petitioner to locate the child, the fact that Respondent—regardless of whether she hid the child—did abscond with the child and leave the United Kingdom in violation of Petitioner's parental rights, and Petitioner's compelling interest in having his child returned to the United Kingdom. But the Court is persuaded that it should not exercise its discretion in this case to return the child. As explained above, there is strong evidence that the child is quite settled in New York. Although Petitioner was fairly diligent in searching for her, his efforts do not outweigh the child's interest in remaining in her current, stable environment. Nor does Respondent's conduct, although clearly inconsistent with the Convention, justify such an exercise of discretion in this case.

In reaching this conclusion, the Court has also considered the specific impact of returning to the United Kingdom on this particular child. By all accounts the child is much improved since arriving in the United States, but she clearly is more vulnerable than an average five-year- old who has never experienced trauma—regardless of the source of the trauma. Even though the Court has concluded that the child would not be at a grave risk of harm if returned, the expert testimony did indicate that such a move, at this time, would be

difficult for the child. This particular child does seem, in the Court's view, to be more fragile than other children, and ordering that she be forced to leave her present stable environment, where she is currently doing well, and returned to the United Kingdom for a custody proceeding would not be appropriate at this time. Such an uprooting potentially would be traumatic enough that, in the exercise of discretion, it outweighs Petitioner's arguments regarding the equities.

Furthermore, the Court reiterates that its decision to deny the Petition is not a custody determination; nor does it mean that Petitioner should not have contact with the child or that Respondent can keep the child away from Petitioner. *See Muhlenkamp*, 521 F. Supp. 2d at 1153 ("The district court cases that have found in favor of the respondent clearly demonstrate that a temporary order on custody should not be issued."); *Wojcik v. Wojcik*, 959 F. Supp. 2d 413, 421 (E.D. Mich. 1997) ("The Court's decision [to deny the petition because the child is settled] is not a decision on who should have custody of the children, or where the children should ultimately live, or even that the children are settled in the United States for the purposes of determining custody."). Instead, this ruling is merely a decision that the custody determination should be made by a court in New York, as opposed to one in the United Kingdom. *See Matovski*, 2007 WL 2600862, at *15 (declining to exercise discretion to grant petition where the Article 12 defense was established, because the courts of the United States and Australia were both competent to consider issues of custody and visitation, travel to Australia for a custody deter-

mination would disrupt the children's schooling, social relationships, and routines, and the father could participate in a New York state court case as he had done in the Hague Convention petition case; therefore, it was "more sensible that any judicial proceedings over custody and visitation occur where the children ar[e] now settled"). Accordingly, the child should not be returned to the United Kingdom at this time and the custody arrangement of the child should be determined by a New York court.[21]

III. Conclusion

For the reasons stated herein, Petitioner has established a prima facie case of wrongful removal under the Hague Convention. Respondent has failed to establish that sending the child back to the United Kingdom for a custody determination would expose the child to a grave risk of harm or place her in an intolerable situation. However,

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[21] The Court acknowledges that this outcome is in many ways unfair to Petitioner, who has been denied access to his child for over two years now. And the Court recognizes that because neither Petitioner nor Respondent appears to have the finances or immigration status to be able to travel easily between the United Kingdom and New York for a custody hearing, this outcome does disadvantage Petitioner (and his opportunities to have a meaningful relationship with his child). But the Convention provides for the settled defense, the merits of which the Court has determined have been established here. And, in the end, given that she is now settled in New York, the Court believes the child is simply too fragile to justify forcing her to return to the United Kingdom at this time.

Respondent has demonstrated that at the time the Petition was filed, the child had been in New York for more than a year and has become settled in her new environment. Lastly, the Court chooses not to exercise its discretion to order the child returned even though she is now settled. Accordingly, the Petition is denied.[22]

SO ORDERED.

Dated: White Plains, New York
August 22, 2011

/s/ KENNETH M. KARAS
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

[22] Because the Court is denying the Petition, Petitioner's request for an order directing Respondent to pay Petitioner's legal costs and fees is also denied.

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International Child Abduction Remedies Act (ICARA)

42 U.S.C. § 11601–11610 (2005)

Sec. 11601. Findings and Declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

Sec. 11602. Definitions

For the purposes of this chapter—

(1) the term 'applicant' means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term 'Convention' means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term 'Parent Locator Service' means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term 'petitioner' means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term 'person' includes any individual, institution, or other legal entity or body;

(6) the term 'respondent' means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term 'rights of access' means visitation rights;

(8) the term 'State' means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term 'United States Central Authority' means the agency of the Federal Government designated by the President under section 11606(a) of this title.

Sec. 11603. Judicial Remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term 'authorities', as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms 'wrongful removal or retention' and 'wrongfully removed or retained', as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term 'commencement of proceedings', as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pur-

suant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Sec. 11604. Provisional Remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Sec. 11605. Admissibility of Documents

With respect to any application to the United States Central Authority, or any petition to a

court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Sec. 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. 301 et seq.), obtain information from the Parent Locator Service.

Sec. 11607. Costs and Fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

Sec. 11608. Collection, Maintenance, and Dissemination of Information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or

(2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

Sec. 11609. Interagency Coordinating Group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central

Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the inter-agency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

Sec. 11610. Authorization of Appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

[LETTERHEAD OF HCCH]

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organi-

sations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a

proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the

Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it

has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is

not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as

between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference

on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or rati-

fication, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Explanatory Report by Elisa Perez-Vera

First Part—General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I. OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the

rule requiring the prompt return of children who have been wrongfully removed or retained.

A *Definition of the Convention's subject-matter*

11 With regard to the definition of the Convention's subject-matter,[10] we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of

[10] See in particular the *Questionnaire and Report on international child abduction by one parent*, prepared by Mr. Adair Dyer, Prel. Doc. No 1, August 1977, *supra*, pp.18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No. 6, May 1980, *supra*, pp. 172-173.

legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals—together with all the drama implicit in the fact that it is concerned with the protection of children in international relations—derives all of its legal importance from the possibility of individuals

establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed

[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping*, prepared by the Permanent Bureau, Prel. Doc. No 5, June 1979, *supra*, pp. 163-164.

resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b*, 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between

parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provi-

sions of article I, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken—in which case the violated custody rights were exercised *ex lege*—as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture?

The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.[12]

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which

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[12] Dyer Report, *supra*, pp. 22-23.

concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs'.[13]

In fact, as Mr. Dyer has emphasized, in the literature devoted to a study of this problem, 'the presumption generally stated is that the true vic-

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[13] Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child*. Text adopted on 4 October 1979.

tim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and un-known teachers and relatives'.[14]

25 It is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child in to its habitual environment —both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the

interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

* * *

Article 2—General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Con-

tracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention. to use the most expeditious procedures available in their own law.

* * *

Articles 12 and 18—Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.

Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child ' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem*, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.

To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith,

unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings,[41] to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted[42] plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

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[41] See Report of the Special Commission, No 92.

[42] See Working Document No 25 (Proposal of the delegation of the Federal Republic of Germany) and *P.-v.* Nos 7 and 10.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to such a conclusion

are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Excerpts from the Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Question 13 (page 149)

Please indicate any important developments since the Special Commission of 2001 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

a) rights of custody (Articles 3 a) and 5 a));

b) habitual residence (Articles 3 a) and 4);

c) rights of access (Article 5 b));

d) the actual exercise of rights of custody (Articles 3 b) and 13(1)a));

e) the settlement of the child in his/ her new environment (Article 12(2));

f) the one year period

United States Response (page 217)

f) The U.S. Supreme Court has stated that, unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations. *Young v. U.S.*, 535, U.S. 43, 122 S.Ct. 1036, 1040, 152 L.Ed. 2d 79 (2002). Several courts have held that equitable tolling may be applied to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking the return. The courts reason that if they did not permit equitable tolling, the parent who abducts and conceals chil-

dren for more than a year will be rewarded for this misconduct by creating eligibility for an affirmative defense not otherwise available. The Eleventh Circuit has held that the one year limitation period begins on the date the petitioner discovers the new residence of a child whose whereabouts have been concealed by the other parent. *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337 (S.D.Fla. 2002); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347 (M.D.Fla. 2002). In *In re Cabrera*, the father had given the mother permission to take their child from Argentina to the United States for one year. After one year, the father realized that the mother was not returning the child and he began Hague proceedings. The court found that Article 12's statute of limitations should be equitably tolled to the time when the left-behind parent becomes aware of the taking parent's intent to remove or retain the child, providing the child is not settled in its new environment. *In re Cabrera*, 323 F. Supp. 2d 1303 (S.D.Fla. 2004).

In *Belay v. Getachew* a mother abducted her child from Sweden to Colorado and concealed her whereabouts. The father searched for three years before he located them and filed for a return under the Hague Convention. The court determined that the mother wrongfully removed the child, but that she had established that the child was well-settled in its new environment. The court held that although the mother had established the "well-settled" defense, equity mandated that the child be returned because the child only became well-settled as a result of the mother's conceal-

ment of their whereabouts. The court held that to allow the Article 12 defense to apply in such a case would essentially be rewarding the behavior that the Convention specifically seeks to deter. *Belay v. Getachew*, 272 F.Supp. 2d 553 (D.Md. 2003).

Question 67 (page 568)

States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 Convention or the implementation of the 1996 Convention.

United States Response (page 577)

United States:

See response to question # 30 on our concern over the use of excessive undertakings. Also, see response to question # 13(f), where we discuss equitable tolling of the filing deadline under the Convention. The USCA supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition.

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]

August 20, 2012

By Electronic Mail

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the
Second Circuit
500 Pearl Street
New York, New York 10007

Re: *Lozano v. Montoya Alvarez*,
Docket No. 11-2224

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States (the "Government") respectfully submits this memorandum brief as *amicus curiae*, regarding the proper interpretation of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or the "Convention").

Interest of the United States

The questions presented in this case concern the proper interpretation of Article 12 of the Hague Convention. The United States has a substantial interest in the manner in which the Convention is

interpreted by the courts of this country. Moreover, "the Executive Branch's interpretation of a treaty is entitled to great weight," *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010), particularly in light of the Department of State's involvement in the negotiation and implementation of the Convention,[1] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

Questions Presented

By letter dated July 11, 2012, this Court requested the State Department's views on two questions: (1) whether equitable tolling applies to the one-year period that triggers the availability of the "now settled" defense under Article 12 of the Convention; and (2) in determining whether a child is "now settled" within the meaning of Article 12, what significance should be given to a child's lack of legal immigration status in the United States.

The Government's responses, as further explained below, are as follows. (1) Equitable tolling does not apply to the one-year period under Article 12; instead, the court retains equitable dis-

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[1] The Department of State represented the United States at the negotiation of the Convention, recommended that the President transmit it to the Senate for approval, was instrumental in proposing its implementing legislation to Congress, has attended periodic international meetings to review the operation of the Convention, and is designated pursuant to the Convention as the United States' "Central Authority," with responsibility for cooperating with its counterparts in other states parties to "secure the prompt return of children and to achieve the other objects of this Convention." Hague Convention, arts. 6, 7; *see* 22 C.F.R. § 94.2.

cretion to order a child's return at any time. A court may do so even if the child is "now settled." And in appropriate circumstances, a court may determine that it need not consider whether a child is "settled" because the court would, in any event, exercise its equitable discretion to order the child's return.[2] (2) The child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Background

A. The Hague Convention

The Hague Convention, implemented by the United States through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 ("ICARA"), was "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott*, 130 S. Ct. at 1989. The Convention provides that a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence, unless certain exceptions apply. Convention, art. 1.

A child who is "wrongfully removed"[3] from a country must be returned to the child's country of

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[2] As explained more fully below, the term "equitable tolling," which applies in the statute-of-limitations context, is a poor fit under Article 12 of the Convention. By using the phrase "equitable discretion," we mean to invoke broadly a court's inherent equitable authority.

[3] Removal is "wrongful[ ]" if it is "in breach of rights of custody . . . under the law of the State in which the child was habitually resident," and "at the time of removal or

habitual residence, unless certain exceptions apply. Convention, art. 1; *accord* 42 U.S.C. § 11601(a)(4); *Blondin v. Dubois* ("*Blondin II*"), 189 F.3d 240, 245 (2d Cir. 1999). As relevant to this case, when more than one year has elapsed between the wrongful removal and "the commencement of the proceedings" where the child is located, the judicial authority "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12.[4] The party opposing the child's return must establish that the child is settled by a preponderance of the evidence, 42 U.S.C. § 11603(e)(2), but a finding that the child is settled does not, by itself, result in the denial of a petition, as the court retains discretion to order the child's return, *Blondin v. Dubois* ("*Blondin IV*"), 238 F.3d 153, 164 (2d Cir. 2001).

B. The District Court's Decision

On November 10, 2010, Manuel Jose Lozano filed a petition in the district court for the Southern District of New York, pursuant to the Hague

retention those rights were actually exercised." Convention art. 3.

[4] Other exceptions to mandatory return exist when the person seeking return of the child "was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention," *id.*, art. 13(a); "there is a grave risk" that the return of the child "would expose it to physical or psychological harm," *id.*, art. 13(b); and the return of the child "would not be permitted under the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," *id.*, art. 20.

Convention and ICARA, requesting that the court issue an order requiring that his daughter be returned to London. *Lozano v. Montoya Alvarez*, 809 F. Supp. 2d 197, 202 (S.D.N.Y. 2011). After an evidentiary hearing and oral argument, the district court denied the petition. *Id.* at 203. Because the petition was filed more than one year after the child's removal, the court held that the respondent, Diana Lucia Montoya Alvarez, could assert the "now settled" defense under Article 12. *Id.* at 226-28.[5] The court rejected petitioner's argument that the one-year period should "toll," but noted that even if the child is now settled, it is still in the court's discretion to order the child returned. *Id.* at 228-29 (citing *Blondin IV*, 238 F.3d at 164, and *Blondin II*, 189 F.3d at 246 n.4). "A court may take into consideration efforts by the abducting parent to conceal the child, or by the searching parent to find the child, in determining whether to repatriate the child even though the child was deemed to be settled." *Id.* at 229.

The court thus considered whether the child is "now settled" and concluded that she was. *Id.* at 231. As part of the analysis, the district court considered "the immigration status of [Montoya Alvarez] and the child." *Id.* at 232. The court rejected Lozano's argument that because Montoya Alvarez and the child have overstayed their visas,

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[5] The court held, in the alternative, that even if it could extend the one-year period, such "tolling" would not be warranted. 809 F. Supp. 2d at 229. The court found that although Montoya Alvarez "did not tell" Lozano of her whereabouts, "she also did not conceal the child," and Lozano had good reason to know Montoya Alvarez's whereabouts. *Id.* at 229-30.

the child cannot be "settled." *Id.* at 232-33. Because "there is no indication that [Montoya Alvarez] and the child face an imminent, or any, threat of deportation," and Montoya Alvarez "is looking into methods to gain legal status," the court reasoned, "there is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and [Montoya Alvarez] is likely to upset the stability of the child's life here in New York." *Id.* at 233.

Finally, the district court declined to exercise its discretion to order the child's return to the United Kingdom, reasoning that the "child's interest in remaining in her current, stable environment" outweighed other considerations. *Id.* at 234.

ARGUMENT

POINT I

Equitable Tolling Does Not Apply to Article 12's One-Year Period, but the Court May Exercise Equitable Discretion at Any Time to Order the Child's Return, and in Appropriate Cases May Do So Without Determining Whether the Child Is Now Settled

Article 12's one-year period is not subject to "equitable tolling." Equitable tolling would have the effect—unintended by the Convention—of foreclosing a district court's analysis of whether a child is now settled in all cases where equitable tolling is applied, regardless of the length of time a child may have lived in her new environment. Instead, a district court retains equitable discre-

tion at all times to consider all factors and order that a child who is now settled should nonetheless be returned. A court may also consider all equitable factors and determine it will decline to undertake the now-settled inquiry. In exercising that equitable discretion, however, the court should remain cognizant that the degree to which the child has become settled is relevant to whether she should be returned.[6]

A. Equitable Tolling Principles

Because Article 12's one-year period is not a statute of limitations, it is not subject to equitable tolling. That doctrine "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (cited in *United States v.*

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[6] It may not be necessary for the Court in this case to reach the question of whether the one-year period is subject to equitable tolling, because the district court held that "even if equitable tolling could apply, tolling would not "be warranted in this case." 809 F. Supp. 2d at 229. That alternative holding was well supported by the district court's findings. The two courts of appeals that have permitted equitable tolling have done so when the abducting parent actively concealed the child's whereabouts, *see In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009); *Furnes v. Reeves*, 362 F.3d 706, 723 (11th Cir. 2004), though in this brief, the Government does not address whether grounds other than concealment would warrant the exercise of equitable discretion. In this case, the district court found that respondent "did not conceal" the child. 809 F. Supp. 2d at 230. Indeed, the district court's findings suggest that for much of the one-year period, petitioner suspected or even knew the child's whereabouts. *See id.* at 210 n.11, 229.

Ibarra, 502 U.S. 1, 4 n.2 (1991)). Limitations periods and equitable tolling thus both balance "the right to be free of stale claims" against "the right to prosecute them," *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quotation marks omitted), the latter taking into account one party's "misleading conduct . . . responsible for the [claimant's] unawareness of his cause of action," *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 60 (2d Cir. 1986).

But unlike a statute of limitations, Article 12's one-year period expiration does not preclude a petitioner from filing a claim or concern only the parties' rights. Rather, it determines whether a court should automatically order the return of a child without regard to her current circumstances, by setting a threshold criterion for whether a respondent may assert a defense that the child has become settled in her new environment. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice provision is not statute of limitations). Applying equitable tolling would entirely preclude district courts, once they have concluded that equitable tolling is appropriate, from considering whether the child is settled and would obligate those courts to order the child's return "forthwith." Foreclosing in all such cases consideration of a third party's interests would not serve the purposes of the equitable tolling doctrine, and, as explained below, would not comport with the text and history of the Convention.

B. Text of the Convention

"'The interpretation of a treaty, like the interpretation of a statute, begins with its text.'"

Abbott, 130 S. Ct. at 1990 (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)).

Article 12's text does not suggest that the one-year period is subject to equitable tolling. Article 12 provides that "[w]here a child has been wrongfully removed," if "a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." It further states that "even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Nothing in the text indicates that the period can be extended. Given that the Convention addresses conduct that is by definition "wrongful" and often surreptitious, the drafters presumably considered the possibility of concealment by the abducting parent, yet they made no provision for an extension of the one-year period. In context, that silence is compelling.

The Convention's text, however, leaves a district court with equitable discretion that may, in appropriate cases, yield a similar result. As this Court has recognized, the "now settled" provision is an "exception" which "allows . . . but does not . . . require" a district court to refuse to order the child's return. *Blondin IV*, 238 F.3d at 164. Article 12 thus does not purport to limit the court's equitable discretion to order return, even in cases filed more than a year after the abduction, if the facts justify that remedy. Even when the court has concluded that the child is now settled in the new country, the court could ultimately hold that the

abducting parent's conduct in concealing the child's whereabouts (and any other equitable factors) justify returning the child to her habitual residence. Nothing in Article 12, moreover, suggests that a court must perform the "now settled" inquiry before it decides that the child should be returned. Given that Article 12 contemplates that a finding of settlement could be outweighed by other equitable factors, it follows that Article 12 also permits the court to forgo the "settled" inquiry when the court concludes that the facts justify ordering return regardless of whether the child is "now settled." This interpretation is consistent with Article 18, which provides that "[t]he provisions of this Chapter [enumerating defenses] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention, art. 18 (emphasis added). Accordingly, in an appropriate case, *e.g.*, where a parent's behavior is so egregious as to warrant a return order irrespective of the child's degree of assimilation, a court may order a child's return without determining whether the child is now settled. The court thus possesses "equitable discretion" not simply to balance the various interests once they have all been explored, but to make the antecedent determination whether a "now settled" inquiry is necessary to its determination.[7]

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[7] Presumably, a district court's exercise of this discretion would be reviewed on appeal for abuse of discretion. *See Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008) (abuse-of-discretion review of decision to deny return after grave-risk defense established); *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) (discretion vests in court upon establishment of defense, and court should be permitted

C. History of the Convention

The Convention's drafting history confirms that equitable tolling is inapplicable. "Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, [courts] have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted); *accord Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) ("In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation."); *see also* Vienna Convention on the Law of Treaties, concluded on May 23, 1969, Art. 32, 1155 U.N.T.S. 331, 340.[8]

The drafters recognized that after enough time elapses, it may not be prudent to return the child automatically. A preliminary report studying the problem of one-parent kidnapping indicated that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation for a period of six months or more." Adair Dyer,

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adequate discretion in ordering or declining return); *In re Adan*, 437 F.3d 381, 398 n.9 (3d Cir. 2006) (suggesting abuse-of-discretion review of return order following establishment of grave-risk defense).

[8] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. See, *e.g.*, *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001).

Report on International Child Abduction by One Parent, in *3 Actes et Documents, Quatorzième Session* 12, 23-24 (1982). And the Special Commission formed to address the issue initially suggested that while a child should be returned to its home country immediately, if "an application has been made more than six months after the removal" of the child and the child has been "habitually resident" in the new country for more than one year, then the court will "assume jurisdiction to determine" the proper custody arrangement rather than simply returning the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in *3 Acts et Documents* 162, 164.

The drafting history also reflects an understanding that a parent who wrongfully removes a child may attempt to conceal the child's whereabouts. *See, e.g., Replies of the Governments to the Questionnaire*, in *3 Acts et Documents* 61, 88 ("There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree."). The preliminary draft thus sets out a two-tier time-period for requiring immediate return, depending on whether the child's location was known. *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Perez-Vera*, in *3 Actes et Documents* 166, 168 (providing that if fewer than six months had elapsed, the authority had to "order the return of the child forthwith"; if the child's location "was unknown," the six months would "run from the date of discovery," but the "total period" could not exceed one year).

In response to the preliminary draft, certain delegates expressed concern that determining when the parent discovered, or should have discovered, the child's location could cause "considerable difficulty." *Procès-verbal No. 7, Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 290, 291 (United Kingdom comment). After extensive debate about the structure and length of the time period, the delegates voted for a single, one- year period. *See Procès-verbal No. 7*, at 291-93. The United States urged a longer period in light of the difficulty of locating the child, *see Procès-verbal No. 7*, at 292, a suggestion that presupposes that the single period would not toll at least for that reason.

In response to "the consequences" of "a short time-limit of one year," Germany proposed that for two additional years after the one-year period elapsed, a country still be required to return a child, unless "the child was now settled in his new environment." *Id.* at 295. That proposal led to the "now settled" language of Article 12. As described by the United States, the Convention thus provided for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, *e.g.*, severe risk to the child. *Procès-verbal No. 10, Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 312, 315. After this initial one-year period, "assimilation became an open question." *Id.*

The Convention's Explanatory Report describes this compromise and suggests that that the one-

year period was not intended to toll."[9] See Elisa Pérez-Vera, *Explanatory Report*, in *3 Actes et Documents* 426, ¶¶ 107-09, at 458. The Report explains the drafters' understanding of Article 12, that ordinarily "return of the child is regarded as being in its interests," but after "a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights." *Id.* ¶ 107. Because of "difficulties" in "stat[ing] this test of 'integration of the child' as an objective rule," the Convention's drafters used a one-year time limit to trigger whether a court may consider such matters. *Id.* In adopting that time limit, the drafters were cognizant of "the difficulties encountered in establishing the child's whereabouts," yet still chose a "single time- limit of one year" and thereby "eliminated" the "inherent difficulty in having to prove the existence of those problems which can surround the locating of the child." *Id.* ¶ 108.

More generally, the Report notes that the Convention "recognizes the need for certain exceptions to the general obligations assumed by the States to secure the prompt return of children who have been unlawfully removed or retained," as "con-

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[9] While the Supreme Court has declined to decide what weight to give the Explanatory Report, *see Abbott*, 130 S.Ct at 1995, it is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503. Accordingly, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. *See Saks*, 470 U.S. at 400; *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (*Explanatory Report* is "authoritative" interpretive guide).

crete illustrations" of the principle that the child's interests are to be the "guiding criterion." *Id.* ¶ 25. Article 12 is one of those exceptions, constituting an acknowledgment that the interests of the child may be served by examining her settlement into her new environment if at least one year has passed before the petition is filed. *Id.* ¶¶ 107-09.[10] The rationale of permitting that examination related to the child's interests further suggests that tolling the one-year period due to the parent's actions would not be consistent with the Convention.

Due to these concerns, in the lead-up to the 2006 Special Commission meeting on the practical operation of the Convention, the United States' written response to the Questionnaire from the Hague Conference on Private International Law expressly stated that "[t]he [United States Central Authority] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."[11] During the discussion of

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[10] The Convention's drafters understood that the examination of settlement would have an impact on achieving the prompt return of a wrongfully removed child. Article 12's first paragraph (regarding proceedings commenced before the one-year period) requires the court to "order the return of the child forthwith." But, as the Report notes, the Convention's omission of the word "forthwith" from the second paragraph of Article 12 results from the drafters' acknowledgment that the urgency of proceedings diminishes after a year has passed. *Id.* ¶ 109.

[11] Consistent with the discussion above, use of the phrase "equitable tolling" here should be understood in the

this issue in the Special Commission, no delegation disagreed.

D. Case Law of Other Signatory States

Other signatory countries have generally agreed that the one-year period is not subject to equitable tolling, but that courts have equitable discretion to return a child who is now settled and may consider an abducting parent's conduct when exercising that discretion. When interpreting the Hague Convention, the "views of other contracting states" are "entitled to considerable weight." *Abbott*, 130 S. Ct. at 1993 (quotation marks omitted). "The principle applies with special force" to the Hague Convention, "for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Id.* (quoting 42 U.S.C. § 11601(b)(3)(B)).

For example, in *Cannon v. Cannon*, the Court of Appeal for England and Wales stated that even where the "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." [2004] EWCA (Civ) 1330 (Eng.) ¶¶ 39, 51. "[D]isregard[ing]" the "period gained by concealment," would be "too crude an approach which risks . . . produc[ing] results that offend what is still the pursuit of a realistic Convention outcome." *Id.* Instead, the court reasoned that because of the "emotional and psychological" effects of concealing a child, when there is concealment "the burden of demonstrating the necessary elements of emotional and psychological

sense of the availability of the exercise of equitable discretion.

settlement were much increased." *Id.* ¶ 61. And "even if settlement is established," the court still could "order a return under the Convention." *Id.* ¶ 62; *see also In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288; *In re C* (2005) 1 F.L.R. 938, 948-949 (Fam. 2004).

Courts in Canada, Hong Kong, and New Zealand have not tolled Article 12's one-year period but several have noted that concealment may nonetheless factor into a court's ultimate determination of whether to order a child's return. *See Kubera v. Kubera*, [2010] 2010 B.C.C.A. 118 (Court of Appeal for British Columbia) ¶¶ 64-69; *A. v. M.*, [2002] 209 N.S.R.2d 248 ¶¶ 74-82 (Nova Scotia Court of Appeal); *A.C. v. P.C.*, [2005] H.K.C. 839 (Hong Kong Court of First Instance); *Secretary for Justice (New Zealand Central Authority) v. H.J.*, [2006] N.Z.S.C. 97 (Supreme Court of New Zealand) ¶¶ 60-70, 86-88.[12]

E. Decisions of United States Courts

A number of courts in the United States have held that Article 12's one-year period may be tolled, including two federal courts of appeals in published decisions and one in an unpublished decision. *See Duarte v. Bardales*, 526 F.3d 563, 569-71 (9th Cir. 2008);[13] *Furnes v. Reeves*, 362

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[12] A Swiss court has also assessed the now-settled defense even in a case of concealment. *Justice de Paix du Cercle de Lausanne*, July 6, 2000, No. J 765 CIEV 112E (Magistrate's Court Switzerland). However, no official English translation appears available.

[13] Another Ninth Circuit panel, however, has expressed doubt about this rule. See *In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009). The latter panel noted that Article 12's

F.3d 702, 723-24 (11th Cir. 2004); *see also Dietz* v. *Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009). These courts did not have the Department of State's views. They also mistakenly began with the premise that Article 12's one-year period is a limitations period that is presumed to toll. *See, e.g., Duarte*, 526 F.3d at 570; *Furnes*, 362 F.3d at 723.

Some of these courts reasoned that "awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return" would "encourage child abductions" and "encourage hiding the child from the parent seeking return." *Duarte*, 536 F.3d at 570. However, a court's equitable discretion means that a parent who conceals a child will not necessarily be rewarded. Although incorrectly placing this discretion under the rubric of "equitable tolling," case law in the United States reaffirms the courts' discretion to order a child's immediate return even after the one-year period has elapsed.

F. Purposes of the Convention

Finally, it is consistent with the overriding purposes of the Convention to recognize that courts have equitable discretion to decide whether to consider the "now settled" defense. Otherwise, judges would have no discretion to decline to consider the

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one-year period "is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child." *Id.* Thus, the panel stated that they must "adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions." *Id.*

defense, no matter what the particular facts of the case may be. Absent any kind of equitable authority to limit the impact of the one-year trigger period, the abducting parent's incentives to engage in bad behavior, such as concealing the child, to reach the one-year trigger could undermine the overarching purpose of the Convention. Because "now settled" inquiries are often highly fact-intensive, undertaking that inquiry could turn what should be a swift examination under the Convention of whether there was a wrongful removal or retention into a drawn-out evidentiary proceeding. This is the type of delay that the Convention seeks to avoid, particularly where the equities of the case would dictate against providing the abducting parent with the possibility of such a time-consuming defense. The Convention is most effective if parents know they cannot benefit from abducting a child.

* * *

In sum, "equitable tolling," in the traditional sense, of Article 12's one-year period to preclude consideration of the child's settlement is not warranted. But the court considering a petition filed more than a year after the child's wrongful removal may still exercise equitable discretion to require the child's return. The court may exercise that discretion to forgo an inquiry into whether the child is now settled in her current environment.

POINT II

Immigration Status May Be Considered in the "Now Settled" Analysis as One of Several Factors, but Standing Alone Should Not Be Dispositive

A child's or parent's immigration status may be considered in determining whether the child is settled under Article 12, but the proper weight accorded to it rests with the court's discretion and varies from case to case. In general, however, the mere fact that the child or her parent lacks lawful immigration status should not be independently dispositive of the "now settled" question.

The text and history of the Convention are silent regarding immigration status. Neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proved, *see* Pérez-Vera Report ¶ 109, and the term itself suggests substantial discretion to consider the facts of each case. The Convention's overarching focus on a child's well-being suggests that this inquiry concerns a child's practical circumstances. Courts have accordingly looked to numerous factors pertaining to a child's attachments and stability.[14]

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[14] Among the factors that courts have considered when conducting the "now settled" analysis are: "(1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability." *In re B. del C.S.B.*, 559 F.3d at 1009.

The degree to which a child's immigration status affects whether the child is settled will necessarily vary. A child who does not currently have lawful immigration status may nonetheless soon obtain lawful status or, in any event, continue to live in the United States with little threat of removal. *See Plyler v. Doe*, 457 U.S. 202, 226 (1982); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("[a] principal feature of the removal system is the broad discretion exercised by immigration officials" considering "immediate human concerns" and that "[i]f removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country"). Conversely, some aliens may have permission to remain temporarily in the United States but nonetheless be at risk of being removed—for instance, an alien may be granted "deferred action," which may be terminated by the Government in its discretion at any time, or "temporary protected status," which must be terminated when country conditions improve.

Foreign courts have given varying weight to immigration status, depending on the circumstances of the case. *See, e.g.*, *A. v. M.* (2002), 209 N.S.R. 2d 248, ¶¶ 79-85 (Nova Scotia Ct. App. 2002) (child had lived in Canada for several years and established roots through friends, schooling, and activities, but mother's "illegal presence" "raises the question of whether she will be able to remain" in the country and "makes it difficult, if not impossible, to work"); *In Re C (A Child)* [2006] EWHC (Fam) 1229, 2006 2 F.L.R. 797 ¶¶ 54-57 (Eng.) (child living in England for 5 years and integrated into a small community of friends, rel-

atives, and school, is settled despite threat of deportation).

American courts have widely agreed that immigration status may be considered only as one factor in the broader "now settled" inquiry. The Ninth Circuit has expressly rejected the argument that immigration status alone is dispositive. *In re B. del C.S.B.*, 559 F.3d at 1009-14. District courts, including the one in this case, have agreed. *See Demaj v. Sakaj*, No. 09-cv-255, 2012 WL 476168, at *4-5 (D. Conn. Feb. 14, 2012); *Etienne v. Zuniga*, No. C10-5061, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010); *Edoho v. Edoho*, A. No. H-10-1881, 2010 WL 3257480, at *4 (S.D. Tex. Aug. 17, 2010).[15]

Thus, immigration status may be considered by the court in the now-settled inquiry, but should not be independently dispositive. Particular immigration- related circumstances may cast doubt on the stability of the child's residence—for instance, as the Ninth Circuit has recognized, "an immediate, concrete threat of removal can . . . constitute

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[15] Others have considered immigration status in finding a child not to be "now settled," but, consistent with the Government's view, only as one factor in a broader inquiry. *E.g.*, *Castillo v. Castillo*, 597 F. Supp. 2d 432, 439-40 (D. Del. 2009); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001); *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004). *Cf. Asuncion Mota v. Rivera Castillo*, F.3d , No. 12-180, 2012 WL 3330176, at *7 (2d Cir. Aug. 15, 2012) (considering immigration status as one factor among others in determining whether child had "acclimatized" to new location thus acquired new habitual residence, i.e., outside "now settled" context).

a significant factor with respect to the question whether a child is 'settled.'" *In re B. del C.S.B.*, 559 F.3d at 1010. A court in weighing the evidence may consider other particular reasons to find that lack of lawful immigration status renders the child unsettled. However, standing alone, the child's lack of lawful immigration status should not be considered dispositive of the question whether a child is "now settled."

Conclusion

The Court should adopt the interpretation of Article 12 of the Hague Convention as described above.[16]

Dated: New York, New York
August 20, 2012

[16] Petitioner suggests that the State Department was obligated to locate or secure legal representation for him. *See* Appellant's Brief at 27-28; Appellant's Reply Brief at 10. That is mistaken. The State Department has no obligation to locate or secure *pro bono* representation for Hague Convention petitioners. The United States took a reservation to the Convention requirement that would require otherwise. *See* Hague Convention, art. 26 (allowing states to make a reservation declaring that it "shall not be bound to assume any costs . . . . resulting from participation of legal counsel or advisers or from court proceedings").

Respectfully submitted,

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OPPOSITION BRIEF

RECORD
AND
BRIEFS

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No. 12-820

IN THE
Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or "Convention"), allows a district court to deny repatriation of a child if a parent files a petition for return more than one year after the child's removal and the child is found to be "now settled" in his or her new environment.

The questions presented are:

1. Whether the Second Circuit correctly held that the doctrine of equitable tolling does not apply to the one-year period set forth in Article 12, after which a parent may invoke the "now settled" defense to repatriation, where equitable tolling is contrary to the text, history and purpose of the Hague Convention, and where the court otherwise retains equitable discretion under Article 12 to return the child even if the defense is satisfied.

2. Whether the Second Circuit correctly held, consistent with the uniform approach of the federal courts, including the Ninth Circuit, that a child's immigration status is only one of many factors that a court can take into account when determining whether a child is "now settled" within the meaning of Article 12 and is not dispositive as a matter of law.

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STATEMENT OF THE CASE

In July 2009, Respondent Diana Lucia Montoya Alvarez and her now seven-year-old daughter fled the United Kingdom to escape an abusive relationship with Petitioner Manuel Jose Lozano, the child's father. Ms. Montoya Alvarez sought refuge in New York at the home of her sister and her sister's family. More than sixteen months later, Petitioner filed a petition pursuant to the Hague Convention to return the child to the United Kingdom for a custody determination ("Petition for Return"). After a two-day evidentiary hearing, the District Court denied the Petition for Return pursuant to Article 12 of the Convention, an exception that allows a court to deny repatriation if a parent files a petition more than one year after the child's removal and the child is found to be "now settled" in his or her new environment. Hague Convention, art. 12. The District Court rejected Petitioner's arguments that the one-year period should be equitably tolled during the time when he was attempting to locate the child, and that the child's lack of legal immigration status should, as a matter of law, preclude application of the Article 12 settled defense. On appeal, the Second Circuit unanimously affirmed the District Court's decision on all grounds.

Petitioner's alarmist claim that the decisions of both lower courts "undermin[e] the fundamental purpose of the treaty", Pet. 3, not only is unsupported, but cannot obscure the fact that his questions presented do not warrant this Court's review. Certiorari should be denied because neither question presents a developed circuit split or an issue of broad importance. Furthermore, the Second

Circuit's decision on both issues was decided correctly and, contrary to Petitioner's claims, is consistent with the text, history and purpose of the Convention.

First, with regard to the question of whether equitable tolling applies to the one-year period in Article 12, Petitioner overstates the extent of any split among the circuits. Pet. 13. In fact, only the Ninth and Eleventh Circuits have ruled on the issue of equitable tolling, *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), whereas the Fifth Circuit, in the case cited by Petitioner, *Dietz v. Dietz*, 349 F. App'x 930 (5th Cir. 2009), assumed it applied without deciding the issue because the issue was not contested. Of these circuit decisions, only the Second Circuit has thoroughly examined the text, history and purpose of Article 12. The more cursory analyses of the Ninth and Eleventh Circuits do not address any part of the Second Circuit's rationale. Because no circuit court has yet considered—let alone disagreed with—the Second Circuit's reasoning, Petitioner's alleged split is undeveloped and review would be premature.

Petitioner also fails to raise any question of broad importance because all three circuit courts of appeals whose decisions Petitioner cites agree that courts should have power in equity to avoid rewarding a parent's misconduct in abducting and concealing his or her child. The only point of departure among these circuits is how this equity should be exercised. Petitioner cites no authority to support his argument that this difference merits Supreme Court review.

Even if this Court were to review the question of equitable tolling, its ruling would not change the outcome of the case because the District Court found, in the alternative, that the application of equitable tolling was not warranted on the facts. App. 101a. Petitioner does not challenge this conclusion.

Moreover, the Second Circuit's decision does not warrant review because it is correct. The court properly relied on the best available evidence of the purposes underlying the Convention—the text of Article 12 in the context of the whole Convention, and its drafting history—to conclude that applying equitable tolling to the one-year period would be inconsistent with the Convention's purpose.

Second, with regard to the question of whether a child's immigration status should be dispositive in determining if the child is now settled, Petitioner can offer no disagreement among any courts. Petitioner even admits that "most courts" that have considered whether a child is settled under Article 12 "have utilized the same multi-factor test employed by the Second Circuit", Pet. 26, which allows immigration status to be considered as one of many factors. In fact, no court agrees with Petitioner: The Ninth Circuit, the only other court of appeals to address the question presented here, also held that a child's immigration status is not dispositive. *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009). Likewise, the district courts uniformly have held that a child's immigration status is merely one of the various factors a court may take into account when deciding if a child is settled. App. 31a n.14.

In addition, Petitioner's second question—as he presents it—was not argued below. Departing from the issues he raised before the Second Circuit, Petitioner now phrases the question presented as turning on the assumption that "the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in [the abducting parent's and child's] immigration status". Pet. at ii. The question presented should not be reviewed by this Court in the first instance.

As with the first question presented, even if the Court were to find this second question reviewable, the Court's decision would not change the outcome. The Second Circuit affirmed the factual findings of the District Court, App. 33a-34a, which acknowledged "unrefuted testimony from Respondent" that she has a legal basis to seek a change in her and her daughter's immigration status, *id.* at 109a.

The Second Circuit's decision, along with the decisions of every other court to consider the issue, is also correct. The Second Circuit's reasoning accords with the text and purpose of Article 12, as well as with the Convention's overall focus on a child's well-being. *Id.* at 30a. Further, consistent with the Convention's limited purpose of determining the location of custody proceedings, the Second Circuit properly focused on factors that impact a child's current living arrangement.

A. Factual Background

Ms. Montoya Alvarez and Petitioner met and began dating in London in early 2004. App. 4a-5a. Their relationship was happy at first, but deteriorated when Petitioner began to verbally abuse Ms. Montoya Alvarez on a daily basis, repeatedly calling her "stupid", "crazy" and a "prostitute". App. 45a; A322, A330, A331, A342.[1] Ms. Montoya Alvarez testified that Petitioner also physically abused her and raped her on four occasions. App. 45a.[2]

In October 2005, Ms. Montoya Alvarez gave birth to the couple's child, who lived with Ms. Montoya Alvarez and Petitioner in London. *Id.* at 5a. In October 2008, Ms. Montoya Alvarez became concerned with the child's behavior and spoke with the child's doctor about a variety of issues, including the child's silence at her nursery, frequent crying, nightmares and bed-wetting. App. 5a. The child's nursery manager also noticed the child's behavior and concluded that the home "environment obviously had a negative effect upon [the child] and [she] became an elective mute at the nursery . . . and became very withdrawn." *Id.* at 52a. Accordingly, the District Court found that "the child had been exposed to, and negatively affected by, the problems in the couple's relationship". *Id.* at 5a-6a.

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[1] In this brief, "A" refers to the Special Appendix filed with the United States Court of Appeals for the Second Circuit.

[2] The District Court determined that it did not need to make findings of fact regarding physical abuse under the settled defense. App. 50a-51a.

In November 2008, Ms. Montoya Alvarez went to New York for a week to visit her sister, Maria. *Id.* at 55a. During that time, the child stayed in London with Petitioner and his mother. *Id.* Petitioner testified that before Ms. Montoya Alvarez left, she gave Petitioner her sister's address and telephone number in case he needed to reach her. *Id.* at 59a-60a n.10.

Ms. Montoya Alvarez testified that when she returned, Petitioner and his mother were acting very suspiciously and the child was acting very fearful. *Id.* at 55a. Ms. Montoya Alvarez demanded that Petitioner and his mother leave her house immediately. *Id.* When they did not, Ms. Montoya Alvarez decided to leave. *Id.*

On November 19, 2008, Ms. Montoya Alvarez left her home with the child and went to the police station to report Petitioner's abuse. *Id.* at 55a-56a.[3] The police ultimately referred her to a women's shelter for victims of domestic violence, where she and the child resided for several months. App. 56a-57a. On July 3, 2009, Ms. Montoya Alvarez and the child left the shelter, and, on July 8, 2009, after spending a few days in Paris, traveled to New York to live with Maria—the very sister Ms. Montoya Alvarez had visited one week before she moved out. *Id.* at 58a, 103a. Ms. Montoya Alvarez "enrolled the

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[3] Contrary to Petitioner's claim that Ms. Montoya Alvarez "claimed falsely" that she contacted the police, Pet. 4, 6, a letter from the Metropolitan Police included in Petitioner's own Application to the Central Authority reflects that in 2008, Ms. Montoya Alvarez told the police of Petitioner's abuse. A156.

child in school, [and] did not change either her or the child's names". *Id.* at 103a. She did not "move the child from one location to another or take other steps to remain hidden". *Id.* She remained in her sister's home.

When the parties separated in November 2008, Petitioner suspected that Ms. Montoya Alvarez would go back to New York to live with her sister. As the District Court found, Petitioner explicitly stated in the papers he filed in July 2009 that "'when the Parties separated in November 2008, the Respondent threatened to take the child to the USA permanently' because she had siblings in the United States who would be able to support her". *Id.* at 59a n.10. At the evidentiary hearing, Petitioner again admitted that when Ms. Montoya Alvarez and the child left him in November 2008, he knew that "Ms. Montoya Alvarez had the ability and the intention to go to the United States to live with her sister", and he believed that "in [the] long term, she will take my daughter to United States". A310.

Not only did Petitioner anticipate from the moment Ms. Montoya Alvarez left that she would go to live with Maria in New York, but he also had Maria's contact information. As the District Court found, Petitioner stated in his Application to the Central Authority that he had not one, but two contact numbers for Maria in New York—her home number and her mobile telephone number. App. 59a-60a n.10. The District Court further found that Petitioner's statement in his Application that he did not have an address for Maria was contradicted directly by his admission at the evidentiary hearing that "when Respondent visited Maria in November

2008, Respondent left Maria's name, address, and phone number in writing with Petitioner". *Id.*

Despite Petitioner's belief from day one that Ms. Montoya Alvarez intended to and had the ability to go to New York to live with her sister, the District Court found that Petitioner never called Maria to determine whether Ms. Montoya Alvarez had taken the child there. *Id.* at 102a. Furthermore, Petitioner never asked his solicitors to contact Maria to see if Ms. Montoya Alvarez had followed through on her plan to move to New York to live with Maria. *Id.* at 102a. Finally, Ms. Montoya Alvarez did not conceal her or her child's whereabouts or their identities such that these efforts would have been futile; they were living under their own names exactly where she told Petitioner she would go and where Petitioner suspected she would go. *Id.* at 103a.

In New York, Ms. Montoya Alvarez and the child live with Maria, along with Maria's partner, daughter and granddaughter. *Id.* at 6a. Ms. Montoya Alvarez and her daughter are supported by Maria, who, at the time of trial, had been employed as a nanny for the same family for the previous four years, and Maria's partner, who owns a grocery. *Id.*

After arriving in New York, Ms. Montoya Alvarez and her daughter began receiving therapy. *Id.* at 7a. Their therapist testified that "when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office, which the therapist characterized as 'very unusual for a normally developed three-year-old child'; in addition, the child would wet herself, was hypervigilant, and had a very heightened startle

response." *Id.* at 62a (quoting A453). By February 2010, the therapist diagnosed the child with post-traumatic stress disorder ("PTSD"). *Id.*

Since her arrival in New York, the child has attended the same school. *Id.* at 6a. According to her report cards from 2009 and 2010, she has been progressing both academically and socially. *Id.* at 6a. Outside of school, the child spends time with her extended family, meets friends at the library and the park, takes ballet classes and attends church with her mother. *Id.* at 6a-7a. The therapist testified that the child is "'a completely different child now,' who has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy." *Id.* at 63a (quoting A455-56); *see also id.* at 7a. Despite her recovery, the District Court found that the child is "more fragile than other children" such that removing her from her stable environment could be traumatic. *Id.* at 113a.

The District Court also found that although Ms. Montoya Alvarez and her daughter have overstayed their visas, there was no evidence that they face any threat of deportation. *Id.* at 108-09a. The District Court also found that Ms. Montoya Alvarez presented "unrefuted testimony" that she is in the process of determining whether she can be sponsored for citizenship by Maria, a United States citizen. *Id.* at 6a, 109a. Thus, the District Court found nothing in the record to suggest that "the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 12a.

B. District Court Decision

On November 10, 2010, more than sixteen months after Ms. Montoya Alvarez and her daughter left the United Kingdom to escape Petitioner's domestic abuse, Petitioner filed a Petition for Return pursuant to the Hague Convention and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610, in the United States District Court for the Southern District of New York, requesting an order requiring that the child be returned to London to have a British court make a custody determination. App. 9a.

The District Court held an evidentiary hearing on February 2 and 3, 2011, at which it received exhibits and heard testimony from the parties, two experts retained by the parties, and the therapist who had treated Ms. Montoya Alvarez and the child in New York. On February 18, 2011, the parties submitted post-trial memoranda of law and proposed findings of fact and conclusions of law upon which oral argument was held on April 28, 2011. At the conclusion of arguments, the District Court denied the Petition for Return. On August 22, 2011, the District Court issued a written opinion further setting forth its findings of fact and conclusions of law.

Although the District Court acknowledged that Petitioner had made out a *prima facie* case of wrongful removal under the Hague Convention, the court denied the Petition for Return, holding that Ms. Montoya Alvarez had established by a preponderance of the evidence that the child was "now settled" in New York, and satisfied the

Convention's Article 12 exception to return. Petitioner argued that the one-year period between the date of the child's wrongful removal and the filing of the petition should be tolled because Petitioner did not know the child's whereabouts during that time. The court disagreed, concluding that the "one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling". App. 99a. The court reasoned that "[a] petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located." *Id.* Citing the Convention's text, history and purpose, the District Court ruled that the "settled defense is not [intended] to give petitioners a reasonable amount of time in which to bring their claims", but "to take into account that if the child has become settled, its interests have to be weighed." *Id.*

In the alternative, the District Court held that "even if equitable tolling could apply to convention petitions", it was not "warranted in this case". *Id.* at 101a. Despite Petitioner's efforts to locate his child in the United Kingdom, the District Court found that he never attempted to contact Ms. Montoya Alvarez's sister in New York, even though he had her contact information. *Id.* at 102a. In rejecting Petitioner's argument that his diligence should excuse his delay in filing, the District Court found that "Petitioner had reason to believe that this very location might be one of the places to which Respondent would bring the child and had contact information; accordingly,

his failure to file the Petition until November 2010 is not excused." *Id.* The District Court further found that Ms. Montoya Alvarez "did not conceal the child to an extent that would warrant equitable tolling". *Id.* at 103a. The court found that Ms. Montoya Alvarez did not go to a location unknown to Petitioner and did not move the child from one location to another to conceal her whereabouts. *Id.*

Having rejected Petitioner's arguments regarding the application of equitable tolling, the District Court found that the now settled defense was available and further found that Ms. Montoya Alvarez established that the child is settled. In reaching that conclusion, the District Court considered all the evidence presented at the hearing, including that the child lives with family in a stable home, is progressing well at school and is supported financially by her family. *Id.* at 105a-07a. The court also considered the fact that Ms. Montoya Alvarez and her daughter have overstayed their visas and do not have legal immigration status in the United States. *Id.* at 108a-09a. However, the court rejected Petitioner's argument that the child's immigration status precluded her from being settled, as a matter of law, and concluded that "[t]here is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 109a.

The District Court also considered whether to exercise the discretion granted by the Convention to order the child's return to the United Kingdom despite finding that she is settled. *Id.* at 112a-13a. The court declined to do so, concluding that

uprooting the fragile child could be "traumatic enough that, in the exercise of discretion, it outweighs Petitioner's arguments regarding the equities". *Id.* at 113a.

C. Second Circuit Decision

In May 2011, Petitioner filed an appeal of the District Court's denial of his Petition for Return. He argued that the court erred in not equitably tolling the one-year period in Article 12, that the court erred in finding that the child was now settled despite her lack of legal immigration status, and that even if the lack of immigration status did not preclude a now settled finding as a matter of law, the District Court erred in finding that Ms. Montoya Alvarez had satisfied the now settled defense by a preponderance of the evidence. App. 13a-14a. The Second Circuit, in a well-reasoned and thorough decision, unanimously affirmed the District Court's decision to deny the Petition for Return on all grounds.

First, the Second Circuit rejected Petitioner's argument that equitable tolling applies to the one-year period in the now settled defense. The Court consulted the text of the Convention and noted that the language of Article 12 "expressly starts the running of the one-year period 'from the date of the wrongful removal or retention'"—not from when the petitioning parent discovers the child's whereabouts. *Id.* at 17a n.8 (quoting Convention, art. 12). The court also recognized that Article 12, considered within the full framework of the Convention, renders equitable relief in the form of tolling "unnecessary", since Article 12 allows "but does not . . . require" a judicial or administrative authority to refuse to order

the return of a child even if the child is settled in her new environment. *Id.* at 18a-19a (quoting *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001)). The Second Circuit explained that unlike a statute of limitations which would prevent a parent from filing a petition after the one-year period has passed, the now settled defense "merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency". *Id.* at 19a.

The Second Circuit also examined the drafting history of the Convention and concluded that equitable tolling was inconsistent with the purposes of the Convention. Consulting the report prepared by the official Hague Convention reporter, Elisa Pérez-Vera ("Pérez-Vera Report"),[4] the court recognized that while the Convention aims to deter child abduction, "a concern for children's 'true interests' was the primary reason the signatory states 'drew up the Convention'". App. 21a (quoting Pérez-Vera Report ¶¶ 23-24). Accordingly, the drafters included certain exceptions to return, including Article 12's now settled defense, to allow for the recognition of "situations where 'the removal of the child can . . . be justified by objective reasons which have to do either with [the child's] person, or

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[4] Pérez-Vera was "the official Hague Conference reporter for the Convention", and her explanatory report is recognized to be "the official history and commentary on the Convention". Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986); *see also Gitter v. Gitter*, 396 F.3d 124, 129 & n.4 (2d Cir. 2005).

with the environment with which [the child] is most closely connected'". *Id.* at 21a-22a (quoting Pérez-Vera Report ¶ 25). In addition, the court recognized that the drafters of Article 12 saw value in agreeing to a "single time-limit of one year" despite awareness of "the difficulties encountered in establishing the child's whereabouts". *Id.* at 23a (quoting Pérez-Vera Report ¶ 108). Specifically, the drafters expressly considered including two time-periods in Article 12, depending on whether the child had been concealed—six months if the child's location were known and one year if the child's location were unknown—and rejected that proposal in favor of the longer period. *Id.* at 23a (citing Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010)). Thus, the court concluded that "the Convention's drafting history strongly supports Alvarez's position that the one-year period in Article 12 was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed." *Id.* at 23a-24a.

The Second Circuit's conclusions were supported by the Government's *amicus* brief, which the court had solicited. The court noted that the Government's brief applied "an interpretive process entirely in line with our own" and "reached the same conclusion" that equitable tolling does not apply to the one-year period. *Id.* at 25a.

Second, the Second Circuit rejected Petitioner's argument that a child's lack of legal immigration status precludes, as a matter of law, a finding that a child is now settled. Citing the text and purpose of the Convention, the court determined that

immigration status should be considered only as one of the many factors courts may take into account when deciding whether a child is now settled, which "is in line with the Convention's overarching focus on a child's practical well-being". *Id.* at 28a, 30a. The court noted that this fact-specific multi-factor test is consistent with the approach applied by district courts across the country. *Id.* at 31a n.14. The court also noted that its refusal to hold that immigration status is dispositive also is consistent with the Ninth Circuit, which is the only other circuit to have addressed the question of whether lack of immigration status should be dispositive. *Id.*

Third, the Second Circuit held that the District Court's factual findings regarding whether the child is now settled were not clearly erroneous. *Id.* at 33a-34a. The court noted that the District Court did not gloss over factual inconsistencies, but fully engaged with all the information before making its determination. *Id.*

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S DETERMINATION THAT THE "NOW SETTLED" DEFENSE IS NOT SUBJECT TO EQUITABLE TOLLING DOES NOT WARRANT THIS COURT'S REVIEW.

A. Review of the Second Circuit's Decision Now Would Be Premature.

Circuit law on the question whether the "now settled" defense is subject to equitable tolling remains undeveloped and is not well suited for this

Court's review. Given the state of the law, as well as this Court's recent discussion of equitable tolling in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. ___, ___ (2013) (slip op., at 11-14), this Court should decline review and permit the lower courts to further consider this question.

1. No Other Circuit Court Has Addressed the Second Circuit's Rationale.

Petitioner misstates the extent of any split among the circuit courts of appeals. Contrary to Petitioner's contentions, Pet. 13, aside from the Second Circuit, only the Ninth and Eleventh Circuits have considered whether equitable tolling can be applied to the one-year period in Article 12. *See Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004). The nine remaining circuit courts of appeals have had no opportunity to consider this question.[5]

Petitioner attempts to avoid this scarcity of circuit law by citing various district court cases "within the jurisdiction of at least ten circuit courts

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[5] The question presented here was not considered by the Fifth Circuit in *Dietz v. Dietz*, 349 F. App'x 930 (5th Cir. 2009). As the Second Circuit noted, App. 27a-28a n.13, the Fifth Circuit expressly stated that the appellant in *Dietz* "[did] not attack the use of equitable tolling as such" and did "not appear to question the court's application of tolling". *Dietz*, 349 F. App'x at 933. Thus, the Fifth Circuit assumed that equitable tolling applied to the one-year period, without analyzing the issue.

of appeal[s]" that have found equitable tolling to be available. Pet. 19. But none of those cases provided any court of appeals with an opportunity to develop the law, primarily because an appeal either was withdrawn or never was taken.[6] Nor do those cases evince well-developed law, because they do not bind any court that may consider this question in the future. *See United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) ("[A] district court opinion does not have binding precedential effect." (internal quotation marks omitted)); *see also McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (noting that "a district judge's decision neither binds another district judge nor binds him"). Thus, the proper focus of whether there is a split in authority is on the decisions of circuit courts.

Although the Second Circuit squarely has rejected the reasoning of the Ninth and Eleventh

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[6] Of the 17 cases cited by Petitioner, *see* Pet. 19-20, no appeal was taken in 10 of them. Of the remaining seven, the appeal voluntarily was dismissed in four cases. *See* Judgment of U.S. Court of Appeals, *Sita-Mambwene v. Keeton*, No. 09-cv-913 (E.D. Mo. Dec. 22, 2009), ECF No. 68; Order from the U.S. Court of Appeals, *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548 (N.D. Ohio Oct. 26, 2007), ECF No. 108; Order, *Belay v. Getachew*, No. 03-1928 (4th Cir. Nov. 24, 2003), Entry No. 61; Notice of Withdrawal of Appeal, *In re Wojcik*, No. 96-cv-71392 (E.D. Mich. Mar. 20, 1997), Entry No. 20. In two cases, the appeal was dismissed for lack of prosecution. *See* Order, *Garza-Castillo v. Guajardo-Ochoa*, No. 12-15568 (9th Cir. Sept. 7, 2012), ECF No. 9; Mandate from the Court of Appeals, *In re Robinson*, No. 97-cv-994 (D. Colo. Apr. 28, 1998), Entry No. 30. One case was dismissed as moot. *See* Order of Dismissal from U.S. Court of Appeals, *Bocquet v. Ouzid*, No. 02-cv-21819 (S.D. Fla. Sept. 17, 2002), ECF No. 31.

Circuits, the converse is not true: The Ninth and Eleventh Circuits' decisions in *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008), and *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), did not consider any part of the Second Circuit's rationale.[7]

First, in addressing whether the "now settled" defense is subject to equitable tolling, neither the Eleventh Circuit's decision nor the Ninth Circuit's decision examines the drafting history of the Convention to ascertain its purposes. *Duarte*, 526 F.3d at 569-70; *Furnes*, 362 F.3d at 723. The relevant analyses of both decisions, for example, fail to cite the Pérez-Vera Report, which makes clear that the Convention holds "the interests of children [to be] of paramount importance in matters relating to their custody", Pérez-Vera Report ¶ 23, that "the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained", *id.* ¶ 25, and that the now settled exception is a "concrete illustration[]" of the Convention's intent of guarding the best interests of children, *id.*

Second, neither decision addressed the view that the one-year period is not a statute of limitations, since the now settled defense by its terms does not "prohibit[] a parent from filing a return petition after a year has expired" but "merely permits courts to

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[7] Indeed, the Eleventh Circuit's discussion of this question is little more than a string cite that cobbles together cases without explaining how their reasoning is sound or applicable to this context. *See Furnes*, 362 F.3d at 723.

consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency". App. 19a. The Ninth and Eleventh Circuits simply equated the one-year period in Article 12 to a statute of limitations to which tolling ordinarily applies. *Duarte*, 526 F.3d at 570 (reasoning "that *limitations periods* are customarily subject to equitable tolling" (internal quotation marks omitted, emphasis added)); *Furnes*, 362 F.3d at 723 ("Unless Congress states otherwise, equitable tolling should be read into every federal *statute of limitations*." (internal quotation marks omitted, emphasis added)).[8]

Third, neither decision considered, as the Second Circuit did, App. 18a-19a, that a court retains equitable discretion to order a return of a child, even where the conditions of the "now settled" defense are met. Instead, both decisions implicitly assumed that tolling is the only form of equitable relief available (or appropriate) under the Hague Convention. *Duarte*, 526 F.3d at 569-70 (concluding that equitable tolling applies because "equitable principles" and "logic and equity" counsel against rewarding a parent that conceals a child); *Furnes*,

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[8] Petitioner's reliance on *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998), to suggest that the Eleventh Circuit supports equitable tolling despite recognizing that the one-year period is not a statute of limitations is baseless. Pet. 17. The passage on which Petitioner relies merely describes the district court's decision. In the very next sentence following Petitioner's quotation, the court expressly declined to reach the issue of whether equitable tolling applied. *Lops*, 140 F.3d at 946.

362 F.3d at 723 (concluding that equitable tolling should apply because otherwise a parent's misconduct in concealing his or her child would be rewarded).

In sum, the Ninth and Eleventh Circuits' decisions cannot be said to be truly in conflict with that of the Second Circuit.

The Second Circuit's decision is thorough and strongly supported by both the Convention's statutory text and drafting history, *see* section I.C, *infra*, and its reasoning very well could persuade the nine circuits yet to consider the question. Moreover, the Ninth and Eleventh Circuits, which have never considered the Second Circuit's analysis, might be persuaded to revisit the question and adopt the Second Circuit's rationale. Indeed, the Second Circuit observed that the Ninth Circuit already has indicated its reconsideration of its reasoning in *Duarte*. App. 27a-28a n.13; *In re B. Del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009). In declining to apply equitable tolling to the facts at issue in *In re B. Del C.S.B.*, the Ninth Circuit noted the "serious concerns" with *Duarte* and its desire to "adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions". *In re B. Del C.S.B.*, 559 F.3d at 1014. Consistent with the Second Circuit's approach, and in contrast to its decision in *Duarte*, the Ninth Circuit cited the Pérez-Vera Report when explaining its desire to limit the application of equitable tolling. *Id.* (citing Pérez-Vera Report ¶ 107).

Guidance from this Court's recent decision in *Auburn Regional* provides additional reason to permit circuit courts to visit (or revisit) the question. In holding that equitable tolling does not apply to certain administrative appeal deadlines, the Court reasoned that the presumption of equitable tolling "was adopted in part on the premise that such a principle is likely to be a realistic assessment of legislative intent", and that this premise was "inapt" in the context of the statute at issue. *Auburn Regional*, 568 U.S. at ___ (slip op., at 12) (internal quotation marks and brackets omitted). Here, no other circuit court (other than the Second Circuit) has made a "realistic assessment" of the intent underlying Article 12. Those circuits should be permitted the opportunity to do so.

Members of this Court have "in many instances recognized that . . . periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court". *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting). As a consequence, this Court should decline to review this question as "a sound exercise of discretion" and allow lower courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court". *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari). Thus, in contrast to the limited binding precedent available now, permitting these issues to "percolate" may yield the further study appropriate for the Court's possible review in the future—or it might obviate the need for such review altogether.

2. All the Circuits That Have Considered This Question Agree That Courts May Sanction a Parent's Misconduct.

Petitioner overstates the impact of the question he presents, primarily because he misapprehends the nature of any disagreement among the Second, Ninth and Eleventh Circuits.

All three courts of appeals agree that a court should have power in equity to avoid rewarding a parent's misconduct. *See* App. 27a ("[T]he Convention expressly provides a mechanism . . . to avoid rewarding a parent's misconduct—a Central Authority's discretion to order the return of a child, even when a defense is satisfied."); *Duarte*, 526 F.3d at 570 (noting that "equitable principles" and "[l]ogic and equity" should apply to prevent encouraging child abductions and concealment); *Furnes*, 362 F.3d at 723 (noting that a parent who abducts and conceals children for more than a year should not be rewarded for that misconduct). The sole point of departure among these circuits is whether such equitable power should come in the form of the court's existing equitable discretion under Article 12, or by an engraftment of equitable tolling principles.

Petitioner's argument that this point of departure nevertheless presents an "important issue" is meritless. Pet. 21. Petitioner threatens that relying solely on equitable discretion will encourage further abductions. According to Petitioner, equitable tolling "sends a clear message" that a parent concealing his or her child's whereabouts "will not benefit from [that] wrongful

action", *id.* at 21-22, whereas equitable discretion reassures such a parent that "there is a reasonable chance you will benefit from your actions" and that he or she should take "a gamble they are likely to win", *id.* at 22. Petitioner fails, however, to cite any authority—and Respondent is aware of none—to support such a distinction, or to support his contention that the purported distinction reflects a present and urgent disparity in incentives requiring resolution.[9]

Petitioner instead notes that only two courts have invoked equitable discretion to order the return of a child after finding that child to be settled, and argues that equitable discretion is insufficient to deter the abduction and concealment of children. Pet. 22; *see F.H.U. v. A.C.U.*, 48 A.3d 1130, 1146-47 (N.J. Super. Ct. App. Div. 2012); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003). But Petitioner's contention remains unfounded. The mere fact that courts have more often applied equitable tolling to address the concealment of a child says nothing about what those courts would have done if equitable tolling were unavailable as a matter of law and equitable discretion were the only vehicle for such considerations. If anything, the circuit courts' broad focus on "equity" and "equitable principles" generally

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[9] Notably, Petitioner does not even attempt to argue that the drafters of the Convention were concerned that equitable discretion would be insufficient to deter child abduction and concealment. As the Second Circuit correctly noted, *see* section I.C, *infra*, the text and history of the Convention does not reflect such a concern.

suggests that if tolling were unavailable, courts would use equitable discretion to address a parent's concealment of his or her child. *See, e.g.*, *Duarte*, 526 F.3d at 570; *see also* App. 27a. And equitable discretion, being in harmony with the intent underlying the Convention, provides a far more natural fit than Petitioner's proffered square peg of equitable tolling.

Thus, courts already have at their disposal a vehicle to take into account the equities and policy considerations that Petitioner incorrectly asserts only equitable tolling can protect.

B. A Decision by This Court Would Not Change the Outcome of This Case.

This case is a poor vehicle for review because a decision by this Court would not change the outcome. Petitioner's question asks whether a district court may equitably toll Article 12's one-year period when the abducting parent has concealed the whereabouts of the child. Pet. at ii. But the District Court expressly held, in the alternative, that, even if equitable tolling were available, such tolling would be unwarranted on the facts of the case. App. 101a-03a ("In any event, even if equitable tolling could apply to Convention petitions, the Court does not believe that tolling would be warranted in this case."). The Second Circuit affirmed this determination. App. 34a. Thus, even if this Court decided that Article 12's now settled exception is subject to equitable tolling, it would not change the outcome of this case. *See* Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (citing *Somerville v. United States*, 376 U.S. 909 (1964)) ("If

the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."). Moreover, the District Court also determined that it would not exercise equitable discretion under Article 12 to order the return of the child despite finding that the child was settled. App. 112a-14a.

Petitioner has not presented any question regarding equitable tolling that would change the outcome. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976) ("[W]e consider only the questions set forth in the petition or fairly comprised therein" (internal quotation marks and brackets omitted).). Nowhere in the petition does the Petitioner challenge in any way the District Court's conclusion that equitable tolling was unwarranted under the facts of this case. Nor would such a challenge warrant this Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Powell v. Nevada*, 511 U.S. 79, 87-88 (1994) (Thomas, J., dissenting).

C. The Second Circuit's Decision Is Correct on the Merits.

Permitting the Second Circuit's decision to stand raises no concerns because it is correct. Consistent with this Court's focus on the "statutory text, structure, and purpose" in determining whether the drafters "did *not* want the equitable tolling doctrine to apply", *Auburn Regional*, 568 U.S. at ___ (slip op.,

at 12) (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)), the Second Circuit appropriately held that the one-year period in the Article 12 now settled defense is not subject to equitable tolling.

The Second Circuit properly interpreted the text of the Convention and noted that the language of Article 12 "expressly starts the running of the one-year period 'from the date of the wrongful removal or retention'"—not from when the petitioning parent discovers the child's whereabouts. App. 17a n.8 (quoting Convention, art. 12). The court also recognized that Article 12, considered within the full framework of the Convention, rendered equitable relief in the form of tolling unnecessary because courts retain equitable discretion to return a child even after finding her to be now settled. *Id.* at 18a-19a. Rather than force a square peg into a round hole, the Second Circuit's interpretation accords with Article 12 and other parts of the Convention. *Id.* at 19a & n.10.

The Second Circuit carefully examined the drafting history of the Convention and appropriately concluded that equitable tolling was inconsistent with the purposes of the Convention. The court recognized that that the drafters of the Convention saw value in agreeing to a "single time-limit of one year" despite awareness of "the difficulties encountered in establishing the child's whereabouts". *Id.* at 23a (quoting Pérez-Vera Report ¶ 108). Moreover, the drafters expressly considered—and rejected—a proposal that provided for two time periods in Article 12, depending on whether the child had been hidden: (1) A period of six months from the child's removal if the child's whereabouts were

known; and (2) where the child's whereabouts were unknown, a period of six months that ran from the date of discovery of the child, provided that the total duration did not exceed a year from the child's removal. *Id.* at 23a (citing Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010)). Instead, the drafters settled on a single time frame of one year—which was the maximum time contemplated even in the proposal that took concealment into account—regardless of whether the child was concealed. *Id.*

The Second Circuit directly addressed and properly rejected Petitioner's central contention here, namely that prohibiting equitable tolling would undermine the primary purpose of the Convention. The court recognized that the signatories "drew up the Convention" to account for children's "true interests" and that the Convention thus "recognizes the need for certain exceptions" to the "general obligation[] . . . to secure the prompt return of children who have been unlawfully removed or retained". *Id.* at 21a-22a (quoting Pérez-Vera Report ¶¶ 23-25). And Article 12 is precisely such an "exception[]" that "concrete[ly] illustrat[es] . . . the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area". *Id.* at 22a (quoting Pérez-Vera Report ¶ 25). Thus, far from undermining the purposes of the Convention, reading Article 12 according to its text and drafting history fulfills its purposes. Likewise, the Government in its *amicus* brief undertook an analysis of the text, history, and purposes of the Convention, as well as case law from other signatory countries, and reached the same conclusion. *Id.* at

177a-88a.[10] Soundly reasoned, the Second Circuit's decision needs no review.

II. THE SECOND CIRCUIT'S DECISION THAT A CHILD'S IMMIGRATION STATUS IS NOT DISPOSITIVE WHEN DETERMINING WHETHER THE CHILD IS SETTLED UNDER ARTICLE 12 DOES NOT WARRANT THIS COURT'S REVIEW.

A. There Is No Conflict in the Circuits.

Petitioner concedes—as he must—that "most courts" that have considered whether a child is settled under Article 12 "have utilized the same multi-factor test employed by the Second Circuit". Pet. 26. Petitioner cites to no precedent—and Respondent is aware of none—to support his novel proposition that a child's unlawful immigration status categorically precludes a finding that the child is settled. Not only is there no split among the circuits, there is not even a single reported case that has ruled contrary to the Second Circuit.[11]

In fact, the Second Circuit's refusal to find immigration status dispositive is consistent with the

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[10] Petitioner's grievances with the Government's position are a non-sequitur. Far from giving inappropriate weight to the Government's position in its *amicus* brief, the Second Circuit provided an independent analysis and merely noted that the Government applied "an interpretive process entirely in line with our own" and "reached the same conclusion". App. 25a.

[11] The only reported case holding to the contrary is no longer good law. *See In re B. Del. C.S.B.*, 525 F. Supp. 2d 1182 (C.D. Cal. 2007), *rev'd*, 559 F.3d 999 (9th Cir. 2009).

position adopted by the Ninth Circuit—the only other circuit court to have squarely addressed this issue. *See* App. 28a ("Given the Convention's text and purpose, immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12."); *In re B. Del C.S.B.*, 559 F.3d at 1009-10 ("[I]t makes little sense to permit immigration status to serve as a determinative factor in the Article 12 'settled' analysis."). In its *amicus* brief, the Government reached the same conclusion as the Second Circuit and the Ninth Circuit, finding that a "child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment". App. 172a. Moreover, as the Petitioner acknowledges, district courts uniformly have considered immigration status as only one of several factors when deciding whether a child is settled. *See, e.g.*, *Etienne v. Zuniga*, No. C10-5061, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010); *Edoho v. Edoho*, No. H-10-1881, 2010 WL 3257480, at *4, *6 (S.D. Tex. Aug. 17, 2010); *Castillo v. Castillo*, 597 F. Supp. 2d 432, 439-40 (D. Del. 2009); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *In re Koc*, 181 F. Supp. 2d 136, 152-54 (E.D.N.Y 2001).[12]

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[12] Foreign courts have also "given varying weight to immigration status, depending on the circumstances of the case". App. 190a-91a (citing *A. v. M.* (2002), 209 N.S.R. 2d 248, ¶¶ 79-85 (Nova Scotia Ct. App. 2002); *In Re C (A Child)*, [2006] EWHC (Fam) 1229, [2006] 2 F.L.R. 797 [54]-[57] (Eng.)).

Given that there is no split in authority whatsoever on the second issue presented, no review by this Court is warranted.

B. The Second Question Presented, as Framed by Petitioner, Was Not Resolved by the Courts Below and in Any Event, Would Not Change the Outcome of This Case.

Petitioner's second question presented is not appropriate for this Court's review for the independent reason that it was not argued before the lower courts. Petitioner's proposed question presented asks "[w]hether an abducted child can be 'settled' in the United States . . . where it is undisputed that both the abducting parent and the child are residing illegally in the United States, *and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.*" Pet. at ii (emphasis added). The second half of the question was not raised by Petitioner in his briefs below. *See* Brief and Special Appendix for Petitioner-Appellant at 2, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 37 (posing in his Statement of Issues presented whether a child can be "well settled" where parent and child lack legal immigration status).[13] Accordingly, the Second Circuit did not

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[13] Although in a footnote in his reply brief, Petitioner attempted to distinguish this case from those in which a child with a pending immigration application was found to be settled, he did not ask the Second Circuit to rule on this distinction.

address this issue in its opinion. App. 28a. Similarly, the Government's *amicus* brief did not speak to this question, concluding that a "child's immigration status should not be dispositive standing alone", *id.* at 172a. Thus, this Court should not accept the second question presented by Petitioner. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (refusing to decide questions that "were neither raised in nor passed upon by the Court of Appeals" and noting that whether the questions have merit is for the "Court of Appeals or the District Court to consider and determine in the first instance").

Moreover, even if this Court were to endorse Petitioner's new formulation of the issue, the rephrasing renders this case an inappropriate vehicle for review because a decision by this Court would not change the outcome. Ms. Montoya Alvarez did, in fact, "present[] [a] basis under existing law for seeking a change in [her and her daughter's] immigration status". As the District Court found, "there is unrefuted testimony from Respondent that she is looking into methods to gain legal status, including having her sister Maria, who is a United States citizen, sponsor Respondent and the child for citizenship". App. 109a. The Second Circuit held that the District Court's factual findings were carefully considered, and not "clearly erroneous". *Id.* at 33a-34a.

Reply Brief for Petitioner-Appellant at 7 n.5, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv) ECF No. 63.

Accordingly, the Court should not review the second question presented because it was not resolved by the courts below and because this particular case is not an appropriate vehicle for Supreme Court review.

C. The Second Circuit's Decision That a Child's Immigration Status Is Not Dispositive Is Correct on the Merits.

The Second Circuit's conclusion that "a court may consider any factor relevant to a child's connection to his living arrangement", App. 30a (quoting *Duarte v. Bardales*, 526 F.3d at 576), is consistent with the text of Article 12, which is broad and endows courts with substantial discretion. It is also consistent with the purpose of Article 12, which "recognizes that there may come a point at which repatriation might not be in [the child's] best interest". *Id.* at 29a (internal quotation marks omitted). The Convention's focus on the child's well-being suggests that a child is settled if she has "significant emotional and physical connections demonstrating security, stability, and permanence in [her] new environment". *Id.* Petitioner's proposed categorical rule would undermine the text and purpose of Article 12 by preventing judges from carefully considering the extent to which a particular child's immigration status actually affects her emotional and physical connections to her new environment.

The Second Circuit's focus on factors that impact a child's current living arrangement is also consistent with the Convention's limited purpose of determining the location of the custody proceedings,

not the child's ultimate country of residence. Petitioner's attempts to frame this issue as "important" by conflating it with a larger discussion about United States immigration policy, Pet. 23-26, is misleading and distorts the narrow aim of a court tasked with making an inquiry under the Convention. *See* App. 32a n.16; *In re B. Del C.S.B.*, 559 F.3d at 1013 ("The determination of future well-being is left to the court conducting custody proceedings. A petition brought under the Hague Convention . . . merely seeks to establish in which country that custody proceeding may take place."); *accord Demaj v. Sakaj*, No. 3:09 CV 255, 2012 WL 476168, at *4 (D. Conn. Feb. 14, 2012); *Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997).

In an attempt to characterize the Second Circuit's treatment of immigration status as out of line with the approach courts have taken when considering other aspects of a child's living arrangement, Pet. 24, Petitioner mischaracterizes the Second Circuit's holding. Petitioner accuses the Second Circuit of adopting a "myopic focus on the 'present'", *id.*, and maintains that the Second Circuit endorsed the view that "a child's immigration status should be relevant to the settled analysis only to the extent that there is an imminent threat of removal", *id.* at 23 (internal quotation marks omitted). This is plainly incorrect. The Second Circuit explicitly rejected this approach, noting that "because we can imagine instances where immigration status may be important even if the threat of removal is negligible, we decline to impose a categorical rule that the weight to be given a child's immigration status varies only in accordance with the threat of

deportation". App. 32a n.16. By holding that "in any given case, the weight to be ascribed to a child's immigration status will necessarily vary", *id.* at 28a, the Second Circuit preserves the discretion of courts to consider all factors that are relevant to evaluating the extent to which a child's immigration status affects whether the child is settled. These factors may include the threat of deportation, the likelihood that the child will obtain lawful status, the child's age and the degree to which the child will be harmed by her inability to receive certain government benefits. *See id.* at 31a-32a. For these reasons, the Second Circuit's holding that a child's immigration status is not determinative under Article 12 does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

February 4, 2013

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REPLY BRIEF

RECORD
~~AND~~
BRIEFS

No. 12-820

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IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent argues that the questions presented "do not warrant this Court's review . . . because neither question presents a developed circuit split or an issue of broad importance." Opp. 1. Respondent's arguments are unavailing.

The first question presents a plain circuit split. The Fifth, Ninth, and Eleventh Circuits, under a doctrine of "equitable tolling," bar an abducting parent from asserting the "settled" defense where the abducting parent's concealment of the child prevented the left-behind parent from filing a petition within the one-year period of Article 12. The Second Circuit held that equitable tolling cannot apply and thus allows abducting parents who have concealed the whereabouts of their child for the one-year period to avoid return of the child by showing that the child is now "settled" in the United States. The circuit courts thus are split over whether equitable tolling applies.

Respondent argues that this split is of no consequence because the district court generally possesses "equitable discretion under Article 12 to return the child even if the defense is satisfied." Opp. i.[1] While both approaches rely on equitable powers, there is a material difference between the two. Under the approach of the Fifth, Ninth, and Eleventh Circuits, where a left-behind parent shows that the abducting parent has prevented the timely

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[1] Respondent is mistaken in asserting that this discretion arises under Article 12. Article 18 states: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, Art. 18. Article 12 says nothing in this respect.

filing of a proper petition, the abducting parent is barred from asserting the settled defense. Under the approach of the Second Circuit, the left-behind parent must defeat the abducting parent's settled defense or meet the considerably higher burden of convincing the court to use its general equitable power to return the child notwithstanding that court having found that the child is settled.

The second question presented involves the proper interpretation and application of a statute codifying an international treaty. It asks whether a child's lack of legal immigration status precludes a settled finding as a matter of law, where there is no evidence of a viable basis to change that status. The Petition presents issues of crucial importance to victims—parent and child alike—of international child abduction.

I. THE CONFLICT RAISED IN THE FIRST QUESTION MERITS THIS COURT'S REVIEW

A. The Circuit Split Cannot Be Denied.

The decision below conflicts with decisions of the Fifth, Ninth, and Eleventh Circuits. Pet. App. 26a ("At least three of our sister Circuits have permitted the one-year period in Article 12 to be equitably tolled."). Respondent's attempt to deny the existence of the circuit split—which the panel below expressly acknowledged it was creating—and to minimize its importance is unpersuasive.

The Second Circuit squarely has rejected the reasoning of the Ninth and Eleventh Circuits. Pet. App. 27a. Respondent admits as much, Opp. 18–19, but asserts that Petitioner "overstates the extent of

any split" and that the circuits are not truly in conflict because the Ninth and Eleventh Circuits "do not address any part of the Second Circuit's rationale." Opp. 2, 19–21. This amounts to sophistry.

First, Respondent's proposition that a conflict does not exist because earlier circuit court decisions did not "address the rationale" of the subsequent decision from another circuit asks for something that is chronologically impossible. And, insofar as Respondent is attempting to suggest that the question was not thoroughly considered by any of the three circuits with which the Second Circuit expressly disagreed, that assertion is belied by the facts. For example, Respondent omits from its discussion the Ninth Circuit decision *In re B. Del C.S.B.*, 589 F.3d 999 (9th Cir. 2009). There, the Ninth Circuit makes frequent reference to both the Convention and the Pérez-Vera Report in its equitable tolling analysis. *Id.* at 1014–15. Both the Ninth and Second Circuits examined the text of the Convention and the official commentary when re-affirming that equitable tolling applies to the settled defense. *Compare id.* at 1014 (citing *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008)), *with* Pet. App. 17a–24a.

Second, contrary to Respondent's assertions, Opp. 19, the Ninth Circuit expressly addressed the view that the one-year period is not a statute of limitations. In concluding that equitable tolling is permitted under the Convention, the Ninth Circuit acknowledged that "'the evident import of [Article 12's one-year period] is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but

rather to put some limit on the uprooting of a settled child.'" *In re B. Del C.S.B.*, 589 F.3d at 1014 (quoting *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), *opinion vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999); Pérez-Vera Report ¶ 107). Thus, Respondent is mistaken when claiming that the Ninth Circuit simply equated the one-year period in Article 12 to a statute of limitations to which tolling ordinarily applies. Opp. 20.

Third, Respondent incorrectly concludes that, because both the Ninth and the Eleventh Circuits apply equitable tolling principles to the settled defense, both courts implicitly assume that tolling is the only form of equitable relief available (or appropriate) under the Hague Convention. Opp. 20. The point each court makes—the point Respondent's argument misses—is that equitable tolling applies to the settled defense because "otherwise a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available." *Furnes v. Reeves*, 363 F.3d 702, 723 (11th Cir. 2004) (internal quotations and citations omitted); *Duarte*, 526 F.3d at 569–70 (holding that "[l]ogic and equity" dictate against "awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return"). As noted in Article 18 of the Convention, courts always retain equitable discretion, but only equitable tolling prevents an abducting parent who has concealed the whereabouts of the child for the one-year period from avoiding return of the child by showing that the child is now "settled" in the United States. Pet. 21.

B. The Petition Raises an Important and Recurring Conflict.

Respondent's effort to dismiss the importance of the conflict fares no better. Respondent argues that the issues raised in the Petition do not merit review because the circuits are split only on "whether . . . equitable power [to avoid rewarding an abducting parent's misconduct] should come in the form of the court's existing equitable discretion under Article 12, or by an engraftment of equitable tolling principles." Opp. 2.[2] The difference between judges' equitable discretion and equitable tolling in the context of the Hague Convention, however, is not a difference without distinction; it is a distinct difference that materially affects a parent's fundamental rights and implicates international relations and comity.[3]

First, as the law of the circuits currently stands, the same circumstances arising in different

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[2] *See supra* note 1.

[3] Respondent argues that the text and history of the Convention "does not reflect . . . a concern" that equitable discretion would be insufficient to deter child abduction and concealment. The drafters of the Convention, however, clearly intended for the Convention to operate in conjunction with other legal rules, such as equitable tolling, to repatriate abducted children:

> [E]ven within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, *any other legal rule which may allow him to obtain the return of a child wrongfully removed* or retained
>
> . . . .

See Pérez-Vera Report ¶ 39 (emphasis added).

jurisdictions will lead to vastly different results. If a parent abducts a child from England and conceals that child's whereabouts for at least one year before the left-behind parent locates them in, by way of example, California, Florida, or Texas, parental custody rights will be determined under English law in England. In contrast, if the same child's whereabouts are concealed through the same actions and for the same duration but the child is ultimately taken to New York, parental custody rights will be determined in New York under New York law, so long as the abducting parent can make the unremarkable showing that, after more than a year, the child is now "settled" in New York.[4] The only exception to this outcome will be if the district court elects to return the "settled" child to England under its general powers of equity and discretion, an action which, in decades of jurisprudence on this issue and hundreds of petitions filed annually, a mere two courts have ever done so in publicly available decisions. Pet. 22. Such inconsistent results do not foster comity or the reciprocity needed to ensure the effective operation of the Hague Convention. Because the Petition presents a question of United States

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[4] To determine whether a child is settled, courts look to a mostly common set of factors. *See In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001). The modesty of meeting this burden is illustrated by this case, where the child was found settled despite evidence that she (1) was just five years old; (2) lacks lawful immigration status; (3) is dependent on a mother who cannot be employed legally; (4) is supported primarily by an aunt's live-in boyfriend in a home with past criminal associations; and (5) missed 14 days in just one semester at nursery school. Pet. App. 105a–110a. If this child is "settled," it is difficult to conceive of circumstances where a child would not be.

common law with respect to interpretation of an international treaty, the opinion of this Court is particularly appropriate and necessary.

Second, the practical operation of equitable tolling and equitable discretion affects the fundamental rights of parents and their ability to exercise those rights. This Court has long recognized the fundamental right of parents to be involved in their child's life barring extreme circumstances. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). Equitable tolling ensures the prompt return of abducted children to their country of habitual residence so that both parents—not just the abducting parent—may exercise their rights relating to their child. In this case, if equitable tolling applied to the one-year filing period, Respondent would have been ordered to return to the United Kingdom with Petitioner's child within a reasonable time period and with appropriate undertakings, her custody would have been adjudicated with the participation of both parents, and Petitioner likely would have some type of custody or visitation rights, and a relationship with his daughter. To date, Respondent's unilateral and illegal actions have prevented Petitioner from playing any role in his daughter's life since her abduction.

Moreover, as a practical matter, ordering the adjudication of custody of foreign nationals and their children in the United States may preclude left-behind parents from meaningfully participating in custody proceedings or in exercising custody rights, as many left-behind parents lack legal immigration status, the financial ability, and other resources that

would enable them to come to the United States. Indeed, the district court below acknowledged that the outcome of this case "disadvantage[s]" and "is in many ways unfair to Petitioner" because he lacks the finances or immigration status necessary to travel between England and New York for a custody determination. Pet. App. 114a, n.21. Moreover, the lack of legal immigration status of the child and her mother substantially inhibits Petitioner's ability to have even visitation with his daughter. *See In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001) (finding that respondent "has made it virtually impossible for [the child] to see her father if she remains in [the United States]" and noting that petitioning father had been denied a visa on four separate occasions "due to respondent's and child's uncertain immigration status").

Third, the issue raised in the first question presented represents a recurring conflict that arises and will continue to arise in almost every jurisdiction in the country. The issue has been percolating in the lower courts for well over a decade, having been considered by four circuit courts and innumerable district courts. Pet. 19–21. It is ripe for this Court's review.

C. Reversing the Court Below May Change the Outcome of This Case.

Respondent argues that certiorari is imprudent because a holding that equitable tolling applies "would not change the outcome of the case." Opp. 3. Respondent's argument, however, overlooks the fact that in asking the Court to determine whether equitable tolling is available under Article 12, Petitioner necessarily asks the Court to articulate the

standard for lower courts to determine whether it applies in a particular case. To the extent that this Court articulates a standard that is distinct from the exceptionally high standard adopted by the district court here, i.e., that the act(s) of concealment must be "egregious," Pet. App. 104a, a reversal may change the outcome of this case.[5] Accordingly, the Court may reverse and remand the case for consideration under the proper standard, as it has done innumerable times. *See, e.g., Tennant v. Jefferson County Commission*, 133 S. Ct. 3, 5–6 (2012) (reversing and remanding where lower court misapplied standard for evaluating challenges to Congressional redistricting plans).

II. THE ISSUE RAISED IN THE SECOND QUESTION MERITS THIS COURT'S REVIEW

A. Petitioner Properly Raised His Second Question to the Second Circuit.

Respondent claims that the second question presented is not appropriate for this Court's review because it was not argued before the lower courts. Opp. 31. Respondent is mistaken.

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[5] Other courts adopt a lenient view of what constitutes concealment, finding that equitable tolling applies where a respondent merely fails to "reveal her location" to the left-behind parent, since that "could have precluded" a petitioner from filing his application in a timely manner. *See Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006).

In the court below, Petitioner argued that "where an abducted child and the abducting parent are both residing in the United States illegally, that child cannot become well-settled in the United States as a matter of law." Brief and Special Appendix for Petitioner-Appellant at 40, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 37. Petitioner further argued that when the "long-term interests and consequences of the child remaining in the United States . . . are taken into account, the destabilizing effects of the child's illegal immigration status preclude a well-settled finding." Reply Brief for Petitioner-Appellant at 5, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 63. The only reason that the child's lack of legal immigration status would have such long-term consequences is where "the abducting parent presents no legitimate pending application or basis under existing law for seeking a change in their immigration status." Pet. ii. Petitioner also directly articulated the question as presented at oral argument and the issue was the subject of extensive argument. Indeed, in the decision below, the Second Circuit recognized the second question articulated in the Petition; however, the Second Circuit failed to resolve it. Pet. App. 31a–32a. ("The importance of a child's immigration status will inevitably vary for innumerable reasons, including: the likelihood that the child will be able to acquire legal status or otherwise remain in the United States . . . ."). The question was raised and considered below, and it merits this Court's review.

B. Contrary to Respondent's Claim, Respondent Failed to Present Any Legitimate Basis for Seeking a Change in Her Immigration Status.

Respondent further argues that a decision by this Court on the second question presented would not change the outcome of the case because the Second Circuit affirmed factual findings of the district court that "unrefuted testimony from Respondent [shows] that she has a legal basis to seek a change in her and her daughter's immigration status." Opp. 4.

But the district court actually never found this. It found "there is unrefuted testimony from Respondent that she is *looking into* methods to gain legal status, including having her sister Maria, who is a United States citizen, sponsor Respondent and the child for citizenship." Pet. App. 6a, 109a (emphasis added). The district court found that Respondent was "looking into it," and that this alone sufficed to overcome a presumption that a child lacking legal immigration status is not settled. Neither the district court, nor the Second Circuit, found that Respondent has a legitimate basis to seek a change in her and her daughter's immigration status, nor has Respondent ever presented such a basis. All Respondent ever presented was that she was "in the process of determining whether she can be sponsored for citizenship." Opp. 9.

Petitioner posits that, for purposes of the settled analysis, an abducting parent must at least bear a burden of presenting evidence of a legitimate pending application or basis under existing law for seeking a change in his or her immigration status. To hold, as the district court and Second Circuit did, that an abducting parent can overcome a presumption that

an illegal immigrant is unsettled merely by testimony that (s)he is "looking into" ways to obtain legal status renders immigration status irrelevant as a practical matter. "Looking into" whether something exists is not evidence of its existence.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 100, provides that "[w]here a child has been wrongfully removed" from one contracting state to another or wrongfully retained in a contracting state and, at the date of the commencement of judicial proceedings, "a period of less than one year has elapsed" from the date of the wrongful removal or retention, the child shall be "return[ed]" "forthwith." The Convention further provides that "even where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

The questions presented are as follows:

1. Whether equitable tolling applies to the one-year period that triggers the availability of the "now settled" defense under Article 12.

2. Whether a child's lack of lawful immigration status in the United States precludes, as a matter of law, the conclusion that the child is "now settled" under Article 12.

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In the Supreme Court of the United States

No. 12-820

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or Convention) "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010); see Hague Convention, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51

Fed. Reg. 10,498 (Mar. 26, 1986).[1] The Convention establishes uniform legal standards and identifies remedies to be employed when a child is abducted from one country to another. See Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See Art. 1. The return remedy is intended to "leave[] custodial decisions to the courts of the country of habitual residence." *Abbott*, 130 S. Ct. at 1989.

Subject to certain defenses, if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located must "order the return of the child forthwith." Convention Art. 12. When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for seeking return of a child abducted to the United States. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021-1022 (2013). Under ICARA, a person who seeks a child's return from the United States may file a petition in state or federal court, and the court must "decide the

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[1] The Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State in connection with the Senate's consideration of the Convention, see *id.* at 10,494, 10,503-10,516.

case in accordance with the Convention." 42 U.S.C. 11603(a), (b) and (d).[2]

2. Petitioner and respondent are the parents of a child who was born in England in 2005. Pet. App. 4a-5a. In November 2008, respondent left petitioner, whom she alleged was abusive, *id.* at 5a-6a, and moved into a women's shelter in England with the child. *Id.* at 6a. In July 2009, respondent and the child left the United Kingdom and eventually traveled to the United States. Since then, they have been living in New York with respondent's sister and her family. *Ibid.*

After respondent's departure, petitioner unsuccessfully attempted to locate his child, contacting respondent's sisters and various police and government offices. Pet. App. 8a. In July 2009, petitioner initiated proceedings in England, seeking orders that would enable him to locate the child. *Id.* at 8a, 58a. In March 2010, petitioner filed an application with the Central Authority for England and Wales, seeking the child's return. *Id.* at 8a. The application, in which petitioner suggested that respondent and the child might be living in New York with respondent's sister, was sent to the United States Central Authority. *Id.* at 59a & n.10.

3. a. In November 2010, 16 months after respondent removed the child from the United Kingdom, petitioner commenced this action, seeking to have the child returned to the United Kingdom pursuant to the Convention and ICARA. Pet. App. 8a-9a. Respondent did not dispute that she had wrongfully removed the child from

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[2] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). The Office of Children's Issues in the Bureau of Consular Affairs in the State Department is the Central Authority. See 22 C.F.R. 94.2.

the United Kingdom within the meaning of the Convention. *Id.* at 78a-80a. But she relied on two of the Convention's defenses to return, including Article 12's provision that when the return petition is filed more than a year after the child's abduction, the court may decline to order return if "it is demonstrated that the child is now settled in its new environment." Art. 12; Pet. App. 81a, 92a-94a. Petitioner contended that Article 12's one-year period was subject to equitable tolling, that the seven-month period during which petitioner asserted he did not "kn[o]w that the child was probably in New York" should be tolled, and that his petition should therefore be treated as though it had been filed within a year of the child's removal from the United Kingdom. *Id.* at 102a; see *id.* at 95a. As a result, petitioner argued, the "Article 12 defense [of settlement] is not available to Respondent." *Ibid.*

b. In February 2011, the district court held an evidentiary hearing, at which the parties presented evidence concerning, among other things, the child's settlement in the United States and petitioner's entitlement to equitable tolling of the one-year period under Article 12. Pet. App. 43a, 60a-73a, 95a, 102a-103a.

In April 2011, the district court denied petitioner's request for the child's return. Pet. App. 35a-36a, 37a-38a, 39a-115a. The court first held that "[t]he one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling." *Id.* at 99a. The court also observed that "even if equitable tolling could apply to Convention petitions," *id.* at 101a, tolling would not be warranted in this case, in part because respondent "did not conceal the child to an extent that would warrant equitable tolling," *id.* at 103a.

The district court next concluded, based on evidence of the child's family, social, and educational ties to New York, that the child had become settled in her new environment. Pet. App. 104a-111a. The court acknowledged that respondent and the child "are not legally in the United States." *Id.* at 108a. But the court concluded that because deportation was not imminent, "the immigration status of the child and Respondent is [unlikely] to upset the stability of the child's life here." *Id.* at 109a.

Finally, the district court held that although Article 12 does not bar a court from ordering the return of a settled child, Pet. App. 100a, it would not order return in this case in light of the child's strong connection to New York and the lack of any countervailing interest warranting return. *Id.* at 112a-114a.

4. The court of appeals affirmed. Pet. App. 1a-34a.

The court held that "the one-year period set out in Article 12 is not subject to equitable tolling." Pet. App. 17a. The court reasoned that "[u]nlike a statute of limitations," which would prohibit filing a petition after the specified period had run, expiration of the one-year period in Article 12 "merely permits courts to consider" whether the child is settled in her new environment in deciding whether to order return. *Id.* at 18a-19a. Because Article 12 is designed to permit the court to "take into account a child's interest in remaining in the country," the court concluded, "allowing equitable tolling of the one-year period would undermine its purpose." *Id.* at 24a.

The court of appeals also observed that equitable tolling was not necessary to ensure that abducting parents do not gain an advantage by concealing the child's whereabouts. Pet. App. 19a. The court explained that

Article 12 permits a court to order return even if the child has become settled in her new environment, and therefore the court may take equitable considerations into account in deciding whether to order return. *Id.* at 18a-19a.

The court of appeals next rejected petitioner's contention that "[w]here an abducted child resides in the abducted-to country illegally, a well-settled finding should be barred as a matter of law." Pet. App. 28a (brackets in original). The court explained that being "'settled' should be understood to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment." *Id.* at 29a. Thus, "immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12," and "in any given case, the weight to be ascribed to a child's immigration status will necessarily vary." *Id.* at 28a.

DISCUSSION

This Court's review is warranted with respect to the question whether Article 12's one-year period is subject to equitable tolling. The court of appeals correctly held that equitable tolling is not available, but that a district court has equitable discretion to order a child returned even if she has become settled in her new environment. The court's decision on equitable tolling, however, conflicts with decisions of three other courts of appeals. That circuit conflict is likely to give rise to uncertainty about, and increased litigation concerning, the availability of equitable tolling under Article 12, which in turn could delay the adjudication of petitions for return. Such delays are inconsistent with the Convention's objective of fostering the uniform and prompt resolution of

return petitions. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1026-1028 (2013). The Court should therefore grant certiorari on the first question presented.

In contrast, certiorari is unwarranted with respect to the question whether a child's current lack of lawful immigration status precludes, as a matter of law, finding that a child is "settled" under Article 12. The court of appeals correctly held, in agreement with the only other court of appeals to consider the issue, that immigration status is a relevant consideration whose weight in the fact-specific settlement analysis may vary according to the circumstances.

I. THIS COURT'S REVIEW IS WARRANTED ON THE QUESTION WHETHER ARTICLE 12'S ONE-YEAR PERIOD IS SUBJECT TO EQUITABLE TOLLING

A. The Court Of Appeals Correctly Held That The One-Year Period Is Not Subject To Equitable Tolling, But That The Court Retains Equitable Discretion To Order Return Even If The Child Is Now Settled

Article 12's one-year period is not subject to equitable tolling because it is not a statute of limitations that governs the time in which a claim must be filed or be barred entirely. Instead, the expiration of the one-year period permits a court, in deciding on the merits whether return is appropriate, to consider whether the child has become settled in her new environment. The court retains equitable discretion under Article 12 to order that a child who is now settled in the United States should nonetheless be returned, and concealment or other misconduct is a factor that the court may consider. A court may also decline to undertake the settlement analysis before ordering return if the circumstances of the case warrant, such as if the court concludes that

equitable factors supporting return would outweigh the fact that the child may be settled in her new environment.

1. a. Article 12 of the Hague Convention establishes a two-pronged framework governing when a court must order that a wrongfully removed or retained child be returned to her country of habitual residence. When the left-behind parent commences proceedings seeking the child's return "less than one year" after the child was wrongfully removed or retained, a court must (with exceptions not relevant here) "order the return of the child forthwith." Art. 12. In contrast, when "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

Article 12's one-year period does not function as a statute of limitations, and it is therefore not subject to equitable tolling. See *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period). A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all, and it reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young* v. *United States*, 535 U.S. 43, 47 (2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable—*i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the

limitations period. See *Lawrence* v. *Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Rather than fixing a time limit after which claims under the Convention may not be filed, Article 12's one-year period governs the substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to "order the return of the child forthwith" if it finds that the child was wrongfully removed (and no other exception to return applies), but instead may consider the child's ties to her new environment in deciding whether to order return. Art. 12. The expiration of the one-year period does not cut off the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return—to the contrary, the court must order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled. See *ibid.*; pp. 11-12, *infra*. Rather than balancing only the parties' respective interests in redress and repose, then, Article 12's one-year period also takes into account *the child's* interests: one year represents the point at which the States Parties to the Convention determined that the child has been in the new environment long enough that the court, in deciding whether to order return, should be authorized to consider whether she is now settled in that environment. See Elisa Pérez-Vera, *Explanatory Report*, in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction*, para. 107, at 458 (Permanent Bureau trans., 1982) (*Actes et Documents*) (while the Convention presumes

that prompt return is in a child's best interests, settlement may affect the appropriateness of return).[3]

To apply equitable tolling as advocated by petitioner would disrupt this framework. In cases in which the court concluded that equitable tolling was appropriate, the petition would be treated as having been filed within one year. See p. 9, *supra*. The court would thus be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reasons for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the obligation to return the child "forthwith." *Explanatory Report* para. 107, at 458.

b. Article 12's text indicates in another way that equitable tolling is not available. Article 12 provides that the one-year period runs from the date of the wrongful removal or retention rather than the date the child's whereabouts were or reasonably should have been ascertained, and it makes no provision for an extension of the one-year period. Given that the Convention addresses conduct that might often involve some degree of concealment of the child's whereabouts, one would expect Article 12's text to address tolling had the Convention's drafters intended for it to be available. See *Explanatory Report* paras. 107-108, at 458-459 (acknowl-

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[3] The *Explanatory Report* is recognized "as the official history and commentary on the Convention." 51 Fed. Reg. at 10,503. This Court has not decided how much weight the *Report* should be accorded. *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1995 (2010).

edging "difficulties encountered in establishing the child's whereabouts" but stating that the "single time-limit of one year" was the optimal resolution of competing concerns).

c. Although Article 12 is not subject to equitable tolling, "the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct— * * * discretion to order the return of a child, even when a defense is satisfied." Pet. App. 27a. Article 12 provides that if the court concludes that the child is settled in her new environment, the court is not obligated to order return. But even then, Article 12 does not prohibit the return of a settled child. Convention Art. 12 (the court "shall also order return, unless" settlement is established). The court therefore retains equitable discretion to order return even if the child is settled. See *Blondin* v. *Dubois*, 238 F.3d 153, 164 (2d Cir. 2001); cf. *Asvesta* v. *Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any of the Convention's exceptions to return); *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (same).

In conducting that equitable assessment, the court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts (and any other equitable factors) justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report* paras. 15-16, at 429. The court may therefore consider the abducting parent's misconduct, together with any other relevant circumstances, such as whether return would not be harmful or disruptive even though

the child has become settled, in deciding whether to order her return.

In addition, given that Article 12 contemplates that the child's settlement could be outweighed by other equitable factors, it follows that Article 12 also affords the court discretion to dispense with the "settled" inquiry—which can involve a fact-intensive inquiry into the child's living situation—when the court concludes that the circumstances justify ordering return regardless of the outcome of the settlement inquiry. For instance, the conduct of the concealing parent might be so extreme that return is called for irrespective of other circumstances. That authority is underscored by Article 18, which provides that "[t]he provisions of this Chapter [enumerating exceptions] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention Art. 18 (emphasis added).

2. The Convention's drafting history reinforces the conclusion that the one-year period is not subject to equitable tolling based on difficulties in locating the child. The preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, in 3 *Actes et Documents* 166, 168 (Art. 11). If the child's location "was unknown," the six months would "run from the date of discovery," but the "total period" could not exceed one year. *Ibid.* After certain delegates expressed concern that determining the "date of 'discovery'" would be difficult, the drafters adopted a single time period that did not vary based on discovery. *Procès-verbal No 7*, in 3 *Actes et Documents*

290, 291-293. The United States urged that the period should be long enough to account for the difficulty of locating the child. *Id.* at 292. The delegates ultimately settled on one year as the appropriate point at which the child's "assimilation [becomes] an open question." *Procès-verbal No 10*, in *3 Actes et Documents* 312, 315. The debate over the length of the single time period thus indicates that the delegates factored in the potential difficulty of locating a child and understood that the one-year period would not be subject to tolling or extension. See *Procès-verbal No 7*, in 3 *Actes et Documents* 292-293; *Explanatory Report* para. 108, at 458 (describing drafters' rejection of "extension of the time-limit").

3. The court of appeals' decision is also consistent with the post-ratification understanding of other States Parties to the Convention. See *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010). To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling have uniformly declined to adopt it. See *Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32, 47-49 (Eng.) (rejecting equitable tolling as "too crude an approach"); *Kubera* v. *Kubera*, 2010 BCCA 118, para. 64 (B.C.); *A.C.* v. *P.C.*, HCMP001238/2004, 2005 WL 836263 (Ct. of First Instance) (Legal Reference System) (H.K.).

Courts of other States Parties also have generally held that courts possess equitable discretion under the Convention to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the settlement analysis. See *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288, 1296-1297, 1304 (appeal taken from Eng.); *Cannon*, 1 W.L.R. at 49; *Kubera*, 2010 BCCA 118, paras. 102-104; *A.* v. *M.*, 2002 NSCA 127,

paras. 74-82 (N.S.); *P.* v. *B. (No. 2)*, [1999] 4 I.R. 185 (Ir.); cf. *Director-General, Dep't of Cmty. Servs.* v. *M & C*, (1998) 24 Fam. L.R. 178, paras. 95-98 (reserving question of discretion to order return under Convention or its implementing regulations) (Family Ct.) (Austr.).

4. Consistent with the foregoing discussion, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States, interprets Article 12 not to permit equitable tolling, but to confer on the court equitable discretion, in cases filed more than a year after wrongful removal, to consider concealment and other equitable factors in determining whether the child should be returned and whether to undertake the settlement inquiry. In its 1986 analysis of the Convention in connection with ratification proceedings, the State Department stated generally that a court is not obligated to return a child who has become settled in her new environment, that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition," and that "it is highly questionable whether the [abducting parent] should be permitted to benefit from such conduct absent strong countervailing considerations."[4] 51 Fed. Reg. at

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[4] The United States' written response to the 2006 Questionnaire from the Hague Conference on Private International Law stated that "[t]he [United States Central Authority] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child." Hague Conference on Private Int'l Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 577 (2006). The State Department thus endorsed the concept of "equitable tolling," as it had been applied in several lower-court decisions, as a means of enabling courts

10,509. The State Department's interpretation is "entitled to great weight." *Abbott*, 130 S. Ct. at 1993 (citation omitted).

B. This Court's Review Is Warranted To Resolve The Disagreement Among The Courts Of Appeals About Whether Article 12's One-Year Period Is Subject To Equitable Tolling

1. The decision below conflicts with published decisions of the Ninth and Eleventh Circuits, see *Duarte* v. *Bardales*, 526 F.3d 563, 569-571 (9th Cir. 2008); *Furnes* v. *Reeves*, 362 F.3d 702, 723-724 (11th Cir.), cert. denied, 543 U.S. 978 (2004), as well as an unpublished decision of the Fifth Circuit, see *Dietz* v. *Dietz*, 349 Fed. Appx. 930, 933 (2009) (following the Eleventh Circuit). Those courts treat the one-year time period as a statute of limitations, and they have held that equitable tolling applies to Article 12 because tolling "should be read into every federal statute of limitations." *Furnes*, 362 F.3d at 723 (citation omitted); see *Duarte*, 526 F.3d at 570.[5]

In those circuits, once a court has determined that the left-behind parent has demonstrated that equitable tolling is appropriate, the court must order the child's

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to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions. Upon broader examination of the issues in connection with its participation in this case as an amicus curiae, the Department concluded that "equitable tolling" in the traditional sense is not the appropriate framework for considering concealment and other equities. Rather, "equitable discretion" is the more appropriate framework for consideration by courts of concealment and other factors bearing on return.

[5] Although the Ninth Circuit subsequently expressed concern that "equitable tolling may permit the return of children otherwise settled in their new environment," the court did not abrogate *Duarte*. See *In re B. del C.S.B.*, 559 F.3d 999, 1014 (2009). Instead, it suggested that tolling should be applied sparingly. *Ibid.*

return without considering whether she had become settled in her new environment. See *Furnes*, 362 F.3d at 723-724 (ordering child returned without inquiring into settlement). By contrast, a court in the Second Circuit may undertake the now-settled analysis even in circumstances in which equitable tolling would be appropriate in the Fifth, Ninth and Eleventh Circuits. While courts in the Second Circuit have equitable authority to order return of a child even if she is found to be settled in her new environment, and may thus sometimes reach the same result as a court applying equitable tolling, the ability to consider whether the child is settled will likely be outcome-determinative in some cases.

Contrary to respondent's suggestion (Br. in Opp. 21-22), further percolation is not warranted. As respondent observes, the circuit split is relatively shallow, and the circuits that have adopted equitable tolling have not engaged in extensive analysis or taken into account all of the factors the Second Circuit found persuasive, including the position of the United States. It is therefore possible that the courts that have adopted equitable tolling might reconsider their views in light of the Second Circuit's decision. Despite these considerations, this Court's review is warranted now.

The disagreement among the circuits gives rise to uncertainty about the parties' respective rights when a petition is filed more than one year after the child's abduction. That uncertainty is likely to engender increased litigation about the availability or application of equitable tolling, which would delay the final resolution of some petitions for return—a particularly harmful result for children and parents who have already lived with the uncertainty caused by abduction for over a

year. Such delay is inconsistent with this Court's statement that "courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation." *Chafin*, 133 S. Ct. at 1027; *id.* at 1028 (litigation "uncertainty adds to the challenges confronting both parents and child"). Uniformity in application of the Convention internationally is also important to achieving its goals of deterring international parental abduction and achieving the prompt return of abducted children. See Art. 1; *Explanatory Report* para. 16, at 429; see also 42 U.S.C. 11601(b)(3)(B); *Abbott*, 130 S. Ct. at 1991. This Court's review therefore is warranted to resolve the conflict among the courts of appeals.

2. The question whether Article 12's one-year period may be equitably tolled also is important. Because international child abduction sometimes involves concealment, and because the left-behind parent may often have difficulty locating the child in another country even without concealment, the availability of equitable tolling is a recurring issue in Hague Convention litigation. Although only four courts of appeals have addressed the issue, the question is litigated with some frequency in district courts—and resolved in decisions that are often not appealed, see Br. in Opp. 18 n.6 (citing cases)—as well as in state courts. See, *e.g.*, *Aranda* v. *Serna*, No. 3:12-cv-0311, 2013 WL 665064, at *11-*12 (M.D. Tenn. Feb. 22, 2013); *Yaman* v. *Yaman*, No. 1:12-cv-221, 2013 WL 322204, at *3-*8 (D.N.H. Jan. 28, 2013); *Fernandez-Trejo* v. *Alvarez-Hernandez*, No. 8:12-cv-02634, 2012 WL 6106418, at *3 (M.D. Fla. Dec. 10, 2012); *Font Paulus ex rel. P.F.V.* v. *Vittini Cordero*, No. 3:12-cv-986, 2012 WL 2524772, at *7-*8 (M.D. Pa. June 29, 2012); *Edoho* v. *Edoho*, No. H-10-1881, 2010 WL 3257480, at *7

(S.D. Tex. Aug. 17, 2010); *F.H.U.* v. *A.C.U.*, 48 A.3d 1130, 1145-1146 (N.J. Super. Ct. 2012); *Perez* v. *Garcia*, 198 P.3d 539, 544-545 (Wash. Ct. App. 2009).

3. This case is a suitable vehicle for resolving the question presented. Respondent contends (Br. in Opp. 25-26) that a decision in petitioner's favor would not alter the outcome of the case because the district court held in the alternative that tolling would be unwarranted on the facts of this case. But the court of appeals, having concluded that Article 12 was not subject to equitable tolling, did not address petitioner's argument that the district court erred in concluding that the facts did not support tolling. See Pet. C.A. Br. 16-28 (arguing that the circumstances warranted tolling); Pet. C.A. Reply Br. 12-16. If this Court were to hold that tolling is available, petitioner would presumably be entitled to renew on remand his arguments that the district court erred in concluding that tolling is unwarranted.

More broadly, if this Court were to hold that the one-year period in Article 12 is subject to equitable tolling, its decision might articulate standards for tolling in Convention cases or otherwise provide guidance as to how courts should conduct the tolling analysis. Cf. *Chafin*, 133 S. Ct. at 1027 (providing guidance to courts considering motions to stay return orders). Conversely, if the Court holds that equitable tolling as such should not be applied to the one-year period, it could offer guidance concerning how delay in commencing a proceeding might nonetheless be taken into account in deciding whether to order return of a child who is found to be settled in her new environment. Either way, this Court's decision could provide direction for further proceedings in this and other cases.

II. THE QUESTION WHETHER A CHILD MAY BE FOUND TO BE SETTLED DESPITE LACKING LAWFUL IMMIGRATION STATUS DOES NOT WARRANT THIS COURT'S REVIEW

The court of appeals correctly held that a child's present lack of lawful immigration status does not, as a matter of law, prevent the child from being settled in the United States under Article 12. That decision does not conflict with any decision of this Court or any other court of appeals, and it does not warrant this Court's review.

A. The court of appeals correctly held that a child's lack of lawful immigration status does not "as a matter of law" preclude a finding that the child is now settled in her new environment. Pet. App. 28a (citation omitted). Rather, immigration status is "one of many factors" that courts may take into account in performing the settlement analysis, and its weight will necessarily vary with the circumstances at issue. *Ibid.*

In determining whether a child is "settled" in her new environment—a concept not defined in the Convention or ICARA—courts consider the facts of each case in order to ascertain whether the child has developed "significant connections to the new country." 51 Fed. Reg. at 10,509. Relevant factors may include the child's age, the stability of her living situation, the duration of her residence in the new environment, the likelihood of further relocation, school and social ties, and the parent's financial stability. See, *e.g.*, *In re B. del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009).

Within that inquiry, the degree to which a child's immigration status may affect whether she is settled will necessarily vary based on the nature and circumstances of the child's lack of status and its impact on her ability

to form connections to her new environment. Pet. App. 32a. For example, a child's present lack of lawful status may have only minimal effects on her ties to the new country if she is likely to obtain lawful status in the near future or would not likely be the subject of an immigration enforcement action. Cf. *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012) (describing avenues of discretionary relief from removal and immigration officials' broad discretion whether to pursue removal). Conversely, a child's present permission to remain in the country might not suggest that she is settled if she faces a risk of being removed after her temporary status expires. The court of appeals therefore correctly held that the weight accorded to lack of immigration status should not be determined "in the abstract," but instead should be based on the circumstances of the case. Pet. App. 32a.

Contrary to petitioner's argument, the court of appeals did not hold that immigration status is relevant to the settlement analysis only when the child faces an "imminent" threat of removal. Pet. 23 (citation omitted). Rather, the court "decline[d] to impose a categorical rule" that the weight to be given a child's immigration status varies only with the imminence of deportation. Pet. App. 32a n.16. Nor did the court suggest, as petitioner contends (Pet. 24-25), that possible long-term consequences of lacking legal status, such as difficulty obtaining government benefits, are irrelevant to the settlement inquiry. Pet. App. 32a n.16. The court declined to find "error in the district court's failure to consider" the long-term consequences of lacking lawful status, but that holding was based on petitioner's failure to present the argument to the district court, not on any categorical rule against considering such evidence. *Id.* at 33a n.17.

Petitioner also contends that respondent should have been required to submit "evidence of a viable basis to change the child's status" before the child could be considered settled in the United States. Pet. 23. But this case would not be an appropriate vehicle for considering that question, because petitioner did not raise it in the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); Pet. C.A. Br. 36-54; Pet. Reply Br. 2-7.

B. There is no conflict among the courts of appeals concerning the effect of a child's immigration status on whether a child is settled. Aside from the Second Circuit, only the Ninth Circuit has addressed that issue, and it too held that lack of lawful immigration status does not necessarily preclude a child from being settled in her new environment.[6] See *B. del C.S.B.*, 559 F.3d at 1012 ("[I]t makes little sense to permit immigration status to serve as a determinative factor.").

Foreign courts have similarly given varying weight to immigration status. See, *e.g.*, *A.* v. *M.*, 2002 NSCA 127, paras. 86-88; *In re C (A Child)* [2006] EWHC 1229, paras. 56-57. We are not aware of any foreign decision holding that immigration status is in all cases determinative of the settlement inquiry.

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[6] The Ninth Circuit also suggested that lacking lawful status is "[i]n general * * * relevant only if there is an immediate, concrete threat of deportation." *B. del C.S.B.*, 559 F.3d at 1009. The import of that statement is somewhat unclear, however, as the court also stated that immigration status should only be a "significant" consideration when the threat of removal is imminent, *id.* at 1010, and that "[i]mmigration status cannot be *determinative* * * * if * * * there is no imminent threat of removal," *id.* at 1014 (emphasis added). Thus, the Ninth Circuit does not appear to have announced a categorical rule about the weight to be given to immigration status.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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MAY 2013

JOINT APPENDIX

RECORD AND BRIEFS

No. 12-820

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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- Brief for the United States as Amicus Curiae, *Lozano v. Alvarez*, 11-2224 (2d Cir. Aug. 20, 2012) 170a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUEL JOSE LOZANO

—v.—

DIANA LUCIA MONTOYA ALVAREZ

No. 7:10-08485-KMK

DN	Date	Description
1	10/10/2010	ORDER, Case sealed. (Signed by Judge Cathy Seibel on 11/10/10) (fk) (Entered: 11/15/2010)
		* * *
4	11/16/2010	ORDER: Respondent and counsel for Petitioner appeared before the Court at a conference on November 16, 2010. For the reasons stated on the record, this matter shall be unsealed. However, Petitioner's original submission of November 10, 2010, the Court's Order of November 12, 2010, and the Court's Amended Order of November 15, 2010, are to remain sealed. Versions of these

		documents, with the Respondent's address and information identifying the child of Petitioner and Respondent redacted, shall be filed by Petitioner via ECF by November 19, 2010, and will remain under seal until further order of the Court, and all future documents shall be filed with such information redacted. So Ordered. (Signed by Judge Kenneth M. Karas on 11/16/10) (fk) (Entered: 11/17/2010)
5	11/16/2010	ORDER: Respondent and counsel for Petitioner appeared before the Court at a conference on November 16, 2010. For the reasons stated on the record, Respondent is not required to post a bond. Additionally, Petitioner may not contact directly Respondent or the child of Petitioner and Respondent, nor may anyone contact Respondent or the child on Petitioner's behalf, except for Petitioner's counsel and others working with Petitioner's counsel on this matter. The Parties will appear before the Court for a conference on November 23, 2010, at 10:00 AM. So Ordered. (Signed by Judge Kenneth M. Karas on

		11/16/10) (fk) (Entered: 11/17/2010)
		* * *
8	11/19/2010	(REDACTED) EMERGENCY PETITION FOR RETURN OF CHILD. (Filing Fee $350.00, Receipt Number 919405).Document filed by Manuel Jose Lozano. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F-1, # 7 Exhibit F-2, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I) (fk) (Entered: 11/19/2010)
9	11/19/2010	(REDACTED) NOTICE of PETITION UNDER HAGUE CONVENTION. Document filed by Manuel Jose Lozano. (fk) (Entered: 11/19/2010)
10	11/19/2010	(REDACTED) ORDER.... The Respondent Diana Lucia Montoya Alvarez shall appear before this Court on the 16th day of November, 2010 at 11:00 am in Courtroom 521...for a hearing on the merits of the Petition for Return of Child to Petitioner....So Ordered. (Signed by Judge Kenneth M. Karas on 11/12/10) (fk) (Entered: 11/19/2010)

11	11/19/2010	(REDACTED) ORDER.... The Respondent Diana Lucia Montoya Alvarez shall appear before this Court on the 16th day of November, 2010 at 11:00 am in Courtroom 521...for a hearing on the merits of the Petition for Return of Child to Petitioner... 5. That anyone interfering with the lawful execution of this order is subject to arrest by the United States Marshal and /or his representitive. 6. That the United States Marshal shall provide the passports and travel documents to the Court. 7. That if Respondent is not at the premises when the nited States Marshal attempts service, tha Marshal may delay service until no later than 6 pm. 8. That Petitioner shall hold harmless the United States Marshals Service and its employees from any and all claims, asserted in any court in connection with the execution of this Order, including any third party claims. So Ordered. (Signed by Judge Kenneth M. Karas on 11/15/10) (fk) (Entered: 11/19/2010)

* * *

16	12/6/2010	AGREED SCHEDULING ORDER: Deadline for service of

		expert report by Respondent January 5, 2011; Deadline for filing memorandum of law in opposition to the petition by respondent January 7, 2011; Deadline for service of rebuttal expert report by Petitioner January 26, 2011. Status Conference set for 2/2/2011 at 10:00 AM before Judge Kenneth M. Karas. SO ORDERED (Signed by Judge Kenneth M. Karas on 12/3/2010) (rj) (Entered: 12/06/2010)
		* * *
19	1/7/2011	RESPONSE to Petition (Other). Document filed by Diana Lucia Montoya Alvarez. (Grayer, Elizabeth) (Entered: 01/07/2011)
		* * *
22	1/11/2011	ENDORSED LETTER addressed to Dear Judge Karas from Elizabeth L. Grayer dated 01/10/2011 re: We request permission to file under seal the enclosed unredacted version of Respondent Diana Lucia Montoya Alvarez's Memorandum of Law in Opposition to Petition for Return of Child to Petitioner (the "Opposition Memorandum"). We believe that the Opposition Memorandum contains sensitive personal infor-

		mation relating to the Respondent or her minor child, and we request that such information not be made available to the public. ENDORSEMENT: Respondent is to submit a new proposed redacted version of his opposing memorandum. What may be redacted from this memorandum is: (i) information that could indentify the child; (ii) information that could identify respondent's location either directly or indirectly; and (iii) privileged medical and mental health information. This redacted version is to be sumitted to the court for in camera review by January 24, 2011. (Signed by Judge Kenneth M. Karas on 1/10/2011) (ma) (Entered: 01/11/2011)
23	1/13/2011	CONFIDENTIALITY ORDER: IT IS HEREBY STIPULATED BETWEEN THE PARTIES AND ORDERED that the following confidentiality procedures shall govern the production and exchange of all documents, testimony and other information produced, given or exchanged by and among all parties to the above-captioned action... IT IS SO ORDERED. (Signed by Judge Kenneth M.

Karas on 1/13/2011) (mml) (Entered: 01/14/2011)

* * *

26	1/26/2011	ORDER: The Court has review Respondent's proposed redacted version of her Memorandum of Law in Opposition to Petition for Return of Child to Petitioner (the "Memorandum"). Some of the proposed redactions do not fall within the categories of information the Court permitted to be redacted in its memorandum endorsement of the letter submitted by Respondent to the Court on January 10, 2011. The Court has highlighted, on the unredacted version of the Memorandum, the redactions that go beyond the scope of the Court's endorsement. These highlighted pages will be filed under seal and faxed to the Parties. Respondent shall either explain why the highlighted language should remain redacted, or submit a new proposed redacted version of the Memorandum with the indicated language unredacted, by February 1, 2011. SO ORDERED (Signed by Judge Kenneth M. Karas on 1/26/2011) (rj) (Entered: 01/28/2011)

* * *

28	2/2/2011	ENDORSED LETTER addressed to Judge Kenneth M. Karas from Carrie R. Bierman dated 2/1/2011 re: Enclosed please find Respondent's proposed redacted version of her Memorandum of Law in Opposition to Petition for Return of Child to Petitioner. ENDORSEMENT: The new proposed redactions are acceptable. Thus, the newly redacted version of Respondent's Memorandum of Law may be publicly filed. SO ORDERED. (Signed by Judge Kenneth M. Karas on 2/1/2011) (mml) (Entered: 02/02/2011)
29	2/2/2011	ENDORSED LETTER addressed to Judge Kenneth M. Karas from Elizabeth L. Grayer dated 2/1/2011 I hereby withdraw my appearance as attorney for respondent Diana Lucia Montoya Alvarez. On February 7, 2011, I will begin a leave of absence from Cravath, Swaine 62 Moore LLP to become President of Legal Momentum. Rachel G. Skaistis, also a member of the firm, along with Carrie R. Bierman, Etienne Bag-Townsend and Lauren Ann Moskowitz, are also represent-

		ing respondent...ENDORSEMENT: The Clerk is respectfully request to docket this letter. The Clerk is respectfully requested to docket this letter. The court wishes Ms. Grayer the best at legal Momentum and thanks her for her willingness to take on this case. So Ordered. (Signed by Judge Kenneth M. Karas on 2/1/2011) (jty) (Entered: 02/03/2011)
30	2/4/2011	MEMORANDUM OF LAW in Opposition re: 28 Endorsed Letter, 8 Petition (Other), Petition (Other) ("Memorandum of Law in Opposition to Petition for Return of Child to Petitioner") [REDACTED]. Document filed by Diana Lucia Montoya Alvarez. (Bierman, Carrie) (Entered: 02/04/2011)
		* * *
32	2/18/2011	POST TRIAL MEMORANDUM. Document filed by Manuel Jose Lozano. (Hein, John) (Entered: 02/18/2011)
33	2/18/2011	POST TRIAL MEMORANDUM. Document filed by Diana Lucia Montoya Alvarez. (Moskowitz, Lauren) (Entered: 02/18/2011)
34	2/18/2011	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF

		LAW. Document filed by Diana Lucia Montoya Alvarez. (Moskowitz, Lauren) (Entered: 02/18/2011)
35	4/7/2011	TRANSCRIPT of proceedings held on February 2, 2011 before Judge Kenneth M. Karas. Court Reporter: Christina M. Arends-Dieck. (cda) (Entered: 04/07/2011)
36	4/7/2011	TRANSCRIPT of proceedings held on February 3, 2011 before Judge Kenneth M. Karas. Court Reporter: Christina M. Arends-Dieck. (cda) (Entered: 04/07/2011)
		* * *
39	4/29/2011	ORDER: The Court held oral argument in the above-captioned matter on April 28, 2011. For the reasons stated on the Record, the Petition is denied. The Clerk of Court is respectfully directed to enter judgment for Respondent and close this case. The Parties shall inform the Court within two weeks of the date of this Order what they would like the Court to do with the traveldocuments of Respondent and the child. (Signed by Judge Kenneth M. Karas on 4/29/2011) (fk) (Entered: 04/29/2011)

40	5/2/2011	JUDGMENT — ORDERED, ADJUDGED AND DECREED: that for the reasons stated on the record on April 28, 2011, the Petition is denied, Judgment is entered in favor of respondent, and the case is hereby closed. (Signed by Clerk of Court Ruby Krajick on 05/02/2011) (dcr) (Entered: 05/02/2011)
41	5/13/2011	ENDORSED LETTER addressed to Judge Kenneth M. Karas from Sharon Mills dated 5/13/2011 re: Counsel for both parties respectfully request that the Court retain the travel documents until the appeal is complete. ENDORSEMENT: SO ORDERED. (Signed by Judge Kenneth M. Karas on 5/13/2011) (mml) (Entered: 05/16/2011)
42	5/27/2011	NOTICE OF APPEAL from 40 Judgment. Document filed by Manuel Jose Lozano. Filing fee $455.00, receipt number 1007858. (fk) (Entered: 06/01/2011)
		* * *
TE	6/3/2011	Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 34 Proposed

Findings of Fact filed by Diana Lucia Montoya Alvarez, 32 Post Trial Memorandum filed by Manuel Jose Lozano, 22 Endorsed Letter,,,, 38 Notice of Appearance filed by Diana Lucia Montoya Alvarez, 13 Notice of Appearance filed by Diana Lucia Montoya Alvarez, 28 Endorsed Letter, 20 Notice of Appearance filed by Manuel Jose Lozano, 16 Scheduling Order, 10 Order, 42 Notice of Appeal filed by Manuel Jose Lozano, 19 Response to Petition (Other) filed by Diana Lucia Montoya Alvarez, 9 Notice (Other) filed by Manuel Jose Lozano, 37 Scheduling Order,, 25 Notice of Appearance filed by Diana Lucia Montoya Alvarez, 8 Petition (Other), Petition (Other) filed by Manuel Jose Lozano, 23 Order, 11 Order,,, 15 Notice of Appearance filed by Manuel Jose Lozano, 39 Order, 29 Endorsed Letter,,, 7 MOTION for Amos Whitney Barclay to Appear Pro Hac Vice. filed by Manuel Jose Lozano, 6 Order Admitting Attorney Pro Hac Vice, 41 Endorsed Letter, 14 Notice of Appearance filed by Diana Lucia Montoya Alvarez, 40 Judgment, 18 Notice of

		Appearance filed by Diana Lucia Montoya Alvarez, 21 Notice of Appearance filed by Manuel Jose Lozano, 5 Order,, 26 Order,,, 30 Memorandum of Law in Opposition, filed by Diana Lucia Montoya Alvarez, 4 Order,,, 24 Notice of Appearance filed by Diana Lucia Montoya Alvarez, 33 Post Trial Memorandum filed by Diana Lucia Montoya Alvarez, 31 Endorsed Letter,,,, were transmitted to the U.S. Court of Appeals. (cda) (Entered: 06/03/2011)
		* * *
43	8/3/2011	Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 42 Notice of Appeal filed by Manuel Jose Lozano 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (cda) (Entered: 08/03/2011)
		* * *
TE	8/3/2011	Supplemental ROA Sent to USCA (File). Supplemental Indexed record on Appeal Files for 42 Notice of Appeal filed by Manuel Jose Lozano were trans-

		mitted to the U.S. Court of Appeals. Transcript(s) #35, & 36. (cda) (Entered: 08/03/2011)
		* * *
44	8/18/2011	TRANSCRIPT filed re: Decision for dates of 04/28/2011, before Judge Kenneth M. Karas re 42 Notice of Appeal. Court Reporter/Transcriber: Christina Arends-Dieck, (914) 390-4103. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/12/2011. Redacted Transcript Deadline set for 9/22/2011. Release of Transcript Restriction set for 11/21/2011. (Arends-Dieck, Christina) (Entered: 08/18/2011)
		* * *
46	8/22/2011	OPINION AND ORDER: For the reasons stated herein, Petitioner has established a prima facie case of wrongful removal under the Hague Convention. Respondent has failed to establish that sending the child back to the United Kingdom for a

custody determination would expose the child to a grave risk of harm or place her in an intolerable situation. However, Respondent has demonstrated that at the time the Petition was filed, the child had been in New York for more than a year and has become settled in her new environment. Lastly, the Court chooses not to exercise its discretion to order the child returned even though she is now settled. Accordingly, the Petition is denied. (Signed by Judge Kenneth M. Karas on 8/22/2011) (lnl) (Entered: 08/22/2011)

* * *

48 8/29/2011 ORDER: On January 28, January 31, February 1, and February 2, 2011, the Court received motions in limine and responses to those motions from counsel for both Parties via email and/or facsimile correspondence. The Court also received a letter, dated January 28, 2011, from Petitioner's counsel regarding two prehearing issues. The Court has electronically filed these documents under seal. Some of these documents contain the names of the

		child and/or the therapist. The Parties have agreed, with the Court's approval, that the identity of both of these individuals should not be revealed. Accordingly, the Parties are directed to electronically file these documents, with the names of the child and therapist redacted, by September 6, 2011. (Signed by Judge Kenneth M. Karas on 8/24/2011) (fk) (Entered: 08/29/2011)
49	9/6/2011	MOTION in Limine / Petitioner's Redacted Motion In Limine filed pursuant to Docket Entry 48 (Order dated August 24, 2011). Document filed by Manuel Jose Lozano. (Attachments: # 1 Exhibit A) (Mills, Sharon) (Entered: 09/06/2011)
50	9/6/2011	OPPOSITION BRIEF / Petitioner's Letter Brief in Opposition to Respondent's Motion In Limine filed pursuant to Docket Entry 48 (August 24, 2011 Order). Document filed by Manuel Jose Lozano. (Mills, Sharon) (Entered: 09/06/2011)
51	9/6/2011	MOTION in Limine ("Respondent's Motion in Limine filed pursuant to Docket Entry 48 (August 24, 2011 order"). Document filed by Diana Lucia Mon-

toya Alvarez. (Moskowitz, Lauren) (Entered: 09/06/2011)

52	9/6/2011	MEMORANDUM OF LAW in Opposition re: 49 MOTION in Limine / Petitioner's Redacted Motion In Limine filed pursuant to Docket Entry 48 (Order dated August 24, 2011). ("Respondent's Letter Brief in Opposition to Petitioner's Motion in Limine filed pursuant to Docket Entry 48 (August 24, 2011 Order)"). Document filed by Diana Lucia Montoya Alvarez. (Moskowitz, Lauren) (Entered: 09/06/2011)

* * *

TE	9/19/2011	Supplemental ROA Sent to USCA (Electronic File). Certified Supplemental Indexed record on Appeal Electronic Files for 46 Memorandum & Opinion, 44 Appeal Transcript, were transmitted to the U.S. Court of Appeals. (cda) (Entered: 09/19/2011)

* * *

TE	6/7/2012	Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 34 Proposed Findings of Fact filed by Diana Lucia Montoya Alvarez were

		transmitted to the U.S. Court of Appeals. (cda) (Entered: 06/07/2012)
		* * *
53	11/14/2012	MANDATE of USCA (Certified Copy) USCA Case Number 11-2224. Ordered, Adjudged and Decreed that the judgment of the District Court is AFFIRMED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 11/14/2012. Certified: 11/14/2012. (br) (Entered: 11/15/2012).
		* * *
TE	11/14/2012	Transmission of USCA Mandate/ Order to the District Judge Karas re: 53 USCA Mandate, (br) (Entered: 11/15/2012)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANUEL JOSE LOZANO

—v.—

DIANA LUCIA MONTOYA ALVAREZ

No. 11-2224

DN	Date	Description
1	6/1/2011	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Manuel Jose Lozano, FILED
2	6/1/2011	DISTRICT COURT ORDER, dated 05/02/2011, RECEIVED
		* * *
6	6/1/2011	ELECTRONIC INDEX, in lieu of record
		* * *
8	6/9/0211	FORM C, on behalf of Appellant Manuel Jose Lozano, FILED
9	6/9/2011	FORM D, on behalf of Appellant Manuel Jose Lozano, FILED
		* * *

26	8/5/2011	DISTRICT COURT SUPPLEMENTAL RECORD ON APPEAL, FILED
		* * *
30	8/23/2011	MOTION, to extend time to 09/30/2011, on behalf of Appellant Manuel Jose Lozano, FILED
		* * *
35	8/26/2011	MOTION ORDER, granting motion to extend time [30] filed by Appellant Manuel Jose Lozano, by RKW, FILED
36	9/30/2011	MOTION, to file document, to seal document, on behalf of Appellant Manuel Jose Lozano, FILED
37	9/30/2011	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Manuel Jose Lozano, FILED
38	9/30/2011	JOINT APPENDIX (Vol. I), on behalf of Appellant Manuel Jose Lozano, FILED
39	9/30/2011	JOINT APPENDIX (Vol. II), on behalf of Appellant Manuel Jose Lozano, FILED
40	9/30/2011	JOINT APPENDIX (Vol. III), on behalf of Appellant Manuel Jose Lozano, FILED

41	9/30/2011	JOINT APPENDIX (Vol. IV), on behalf of Appellant Manuel Jose Lozano, FILED
		* * *
49	10/5/2011	MOTION ORDER, granting motion to file document under seal document [36][36], filed by Appellant Manuel Jose Lozano, by RR, FILED
		* * *
53	10/13/2011	SEALED EXHIBIT, volume(s) 1 of 1, on behalf of Appellant Manuel Jose Lozano, FILED
		* * *
60	12/30/2011	BRIEF, on behalf of Appellee Diana Lucia Montoya Alvarez, FILED
		* * *
63	1/13/2012	REPLY BRIEF, on behalf of Appellant Manuel Jose Lozano, FILED
		* * *
70	6/8/2012	SUPPLEMENTAL ELECTRONIC INDEX, in lieu of record, FILED
		* * *
74	7/11/2012	LETTER, requesting that the Secretary of State submit her views concerning the Hague Convention's text, SENT

* * *

76	7/19/2012	LETTER, dated 07/17/2012, on behalf of non-party United States Department of State, RECEIVED

* * *

79	7/26/2012	LETTER, in response to July 17, 2012 letter, SENT
80	8/20/2012	LETTER, dated 08/20/2012, on behalf of non-party United States Department of State, RECEIVED

* * *

82	8/22/2012	CASE, before RAK*, RCW, GEL, C.JJ., HEARD

* * *

92	9/4/2012	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of, Amicus Curiae United States of America, FILED

* * *

97	10/1/2012	OPINION, affirmed, by RAK, RCW, GEL, FILED

* * *

100	10/1/2012	JUDGMENT, FILED
101	10/2/2012	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED

102	10/2/2012	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED
103	10/2/2012	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED
104	10/2/2012	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED
		* * *
105	10/2/2012	INTERNET CITATION NOTE: Material from decision with internet citation, ATTACHED
		* * *
108	11/14/2012	JUDGMENT MANDATE, ISSUED
109	1/4/2013	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 01/04/2013, U.S. Supreme Court docket # 12-820, RECEIVED
		* * *
111	6/24/2013	U.S. SUPREME COURT NOTICE, dated 06/24/2013, U.S. Supreme Court docket # 12-820, stating the petition for writ of certiorari is granted limited to Question 1 presented by the petition, RECEIVED

113	6/24/2013	U.S. SUPREME COURT QUESTION PRESENTED, dated 06/24/2013, RECEIVED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
White Plains Division

Case No. ____

In re the Application of: Manuel Jose Lozano

Manuel Jose Lozano

Redacted

Petitioner,

vs.

Diana Lucia Montoya Alvarez

Redacted

Respondent.

EMERGENCY PETITION FOR WARRANT IN LIEU OF WRIT OF HABEAS CORPUS AND PETITION FOR RETURN OF CHILD TO PETITIONER

The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980; International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq.

I. Preamble

1. This petition arises from the unlawful removal and retention of **REDACTED REDACTED** ("the child") by her mother, the Respondent, from her habitual place of residence in England, United Kingdom. On information and belief, in September 2009, Respondent removed the child from the United Kingdom and brought her to this District, where they both now reside. Petitioner the child's father, seeks provisional and permanent relief that would allow a court of the United Kingdom to make an appropriate custody determination, in accordance with the laws of the United Kingdom, and in the best interest of the child. This Court is not called upon to make a custody determination, but rather a ruling, consistent with principles of international comity and the treaty obligations of the United States, as to the proper forum where that determination should be made.

2. The specific legal grounds for this Petition are The Convention on the Civil Aspects of International Child Abduction done at the Hague on October 25, 1980 ("the Convention"), as well as the International Child Abduction Remedies Act ("ICARA") (42 U.S.C. § 11601 et seq.). The Convention went into effect on July 1, 1988. A copy of the Convention and ICARA are attached to this Petition as Exhibits A and B, respectively, and are incorporated as though specifically rewritten herein.

3. Both the United States of America and the United Kingdom have been Contracting States under the Convention since July 1, 1988.

II. Jurisdiction

4. This Court has subject matter jurisdiction pursuant to 42 U.S.C. § 11603 and because this case involves the wrongful removal and retention of a child under the age of sixteen from **REDACTED** habitual residence in England, United Kingdom, to the United States of America.

5. This Court has personal jurisdiction because the Respondent and the child, on information and belief, are located in this judicial district. Venue is proper in the Southern District of New York because the Respondent and the child, on information and belief, are located in this judicial district.

III. Status of Petitioner and Child

6. The Convention applies to cases where a child under the age of sixteen (16) years has been removed from his or her habitual residence in breach of the Petitioner's rights of custody, which the Petitioner had been exercising at the time of the wrongful removal or wrongful retention of the child.

7. Petitioner, Manuel Jose Lozano, has a right to custody of to the child within the meaning of Articles Three and Five of the Convention because he is the child's father. *See* Section 2(2) of the British Children's Act of 1989 (attached as Exhibit C), and Section 1 of the Child Abduction Act 1984 England and Wales Law (attached as Exhibit D)

8. The child was born on **REDACTED** and is now **REDACTED**. She will **REDACTED** years of age on **REDACTED**, almost **REDACTED** years

from now. A copy of the child's birth certificate is attached as Exhibit **REDACTED.**

9. The child was habitually resident in England within the meaning of Article 3 of the Convention since her birth until her wrongful removal from England.

10. At the time of Respondent's wrongful removal and retention of the child, Petitioner was actually exercising custody of the child within the meaning of Articles Three and Five of the Convention, in that he is the child's father and has exercised custody rights over his **REDACTED** since **REDACTED** was born.

11. Petitioner has filed a Request for Return of the Child to England with the United States Department of State, the Central Authority of the United States of America under the Convention. The Request for Return is attached hereto as Exhibit F. At the time of Petitioner's application to the Central Authority for England and Wales, he was located in greater London, England and be remains located there.

IV. Respondent's Wrongful Removal and Retention of the Child

12. Sometime after mid-August 2009, Respondent wrongfully removed the child from England within the meaning of Article Three of the Convention and continues to wrongfully retain the child in the United States of America despite Petitioner's efforts to have the child returned.

13. At the time Petitioner filed the Request for Return of the Child to the Central Authority of

England, Respondent was a habitual resident of England.

14. On information and belief, the child is presently in the State of New York, Town of **REDACTED** and within the territorial jurisdiction of this Court. Unless this Court takes immediate measures to bring Respondent and the child before the Court, irreparable harm will occur to the child's wellbeing because she is being denied all access to her father.

V. Custody Proceedings

15. Petitioner is not aware of any custody proceedings concerning the custody of the child.

VI. Provisional Remedies (42 U.S.C. § 11604)

16. The objects of the Convention are: (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. Convention, Art. 1. These purposes cannot be met if the children are removed from this jurisdiction while this case is pending. Therefore, Section 11604 of ICARA empowers this Court to fashion appropriate provisional remedies to secure the child in this jurisdiction.

17. Specifically, so long as the requirements of the substantive and procedural state law are met, ICARA provides that any court exercising jurisdiction of an action seeking the return of a child "may take or cause to be taken measures under

Federal or state law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." 42 U.S.C. § 11604(a).

18. Section 11604 (Provisional Remedies) of ICARA provides, *inter alia,* that, in a proceeding for the return of a child, "no court exercising jurisdiction . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied." 42 U.S.C. § 11604 (2001). In this case, the State law referred to is that of New York. In New York, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") governs the resolution of both domestic and international child custody disputes. Section 77-j of the UCCJEA provides that the "[i]f the court, upon testimony of the petitioner or other witness, finds that the child is likely . . . to be removed from this state, it may issue a warrant to take physical custody of the child."

19. Petitioner believes that unless a Warrant of Arrest is issued, Respondent will remove the child from the jurisdiction of this Court and/or further secrete the child. Respondent's own actions are evidence that the child is likely to be removed from this state. Rather than seeking a custody order from a court of the United Kingdom, Respondent absconded with the child and has concealed the child from her father ever since. Only with the assistance of the United States Department of State and a private investigator hired by

legal counsel was Petitioner able to discern the whereabouts of the child.

20. Because ICARA requires that a Convention petition be filed only in the jurisdiction where the child is located, 42 U.S.C. § 11603 (2001), the provisional remedies requested are appropriate and necessary. If Respondent removes the child from the Southern District of New York, Petitioner will have to locate the child and institute a new Hague Petition, if he is able to locate the child in a contracting state at all.

21. Petitioner therefore requests that the Court issue a Warrant of Arrest in lieu of Writ of Habeas Corpus and direct any peace officer within the State of New York to deliver the child into the temporary protective custody of Social Services within this district while the matter is pending. A proposed Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus is attached hereto as Exhibit G.

22. In the alternative, pending further hearing in this Court, Petitioner requests that this Court issue an immediate Show Cause Order prohibiting the removal of the child from the jurisdiction of this Court, requiring Respondent to post a bond in an amount to be determined by this Court, and commanding Respondent to appear before this Court along with any and all passports and travel documents for the child and for the Respondent for an initial hearing so that a date may be set for an expedited hearing on the merits of the Petition for the Return of the Child. A proposed Show Cause Order is attached hereto as Exhibit H.

VII. Relief Requested

23. Petitioner is a person as defined by 42 U.S.C. § 11602(5) who has a right of custody of the child for whom this Petition has been filed. Such right of custody has been breached within the meaning of Article Three of the Convention.

24. The child is being held illegally in custody, confinement or restraint by Respondent, Diana Lucia Montoya Alvarez.

25. Respondent is wrongfully retaining the child within the meaning of Article Three of the Convention and has failed to return the child to Petitioner.

WHEREFORE, Petitioner respectfully requests the following relief:

A. a permanent Order directing the prompt return of the child to her habitual residence of England, United Kingdom;

B. provisional relief through an Order for Issuance of a Warrant in Lieu of Writ of Habeas Corpus ordering the child to be placed in the temporary protective custody of Social Services within this district while the matter is pending, or, in the alternative, a Show Cause Order prohibiting the removal of the child from the jurisdiction of this Court and commanding the Respondent to appear in this Court with the child to show cause why the child has been kept from her father;

C. if the Respondent fails to appear pursuant to this Court's Show Cause Order, an Order directing that the name of the child be entered into the national police computer system (N.C.I.C.) missing person section;

D. an Order permitting the filing of this Emergency Petition and all exhibits under seal in order to protect the identity and whereabouts of the child (see Exhibit I);

E. an Order directing Respondent to pay Petitioner's legal costs and fees; and

F. any such other and further relief as the Court deems appropriate or just.

VIII. Notice of Hearing

26. Under 42 U.S.C. § 11603(c), Respondent shall be given notice of the hearing on the merits of the Petition according to N.Y.C.P.L.R. § 308.

IX. Attorneys' Fees and Costs Including Transportation Expenses Pursuant to Convention Article 26 and U.S.C. § 11607

27. Petitioner has incurred substantial expenses as a result of the wrongful removal and retention of the child by Respondent. Petitioner will submit a copy of all expenditures as soon as practicable and possible and will amend these costs, from time to time, according to proof and in light of further expenditure required because of this wrongful removal and retention.

28. Petitioner respectfully requests that this Court award all legal costs and fees incurred to

date as required by 42 U.S.C. § 11607, reserving jurisdiction over further expenses.

X. Declaration Pursuant to the New York UCCJEA

29. The details regarding the child that must be provided under the New York UCCJEA are as follows:

A. On information and belief, the child's present address is **REDACTED**, **REDACTED**, and she has resided there since **REDACTED**.

B. From the child's birth on **REDACTED** until **REDACTED** the child lived at **REDACTED REDACTED**. From **REDACTED**, the child lived at **REDACTED REDACTED REDACTED**. From **REDACTED REDACTED** upon information and belief, the child lived at various locations with Respondent, including a **REDACTED REDACTED** address withheld.

C. Petitioner does not know of any custody proceeding concerning the child pending in this or any other court. Petitioner intends to commence custody proceedings against Respondent in the United Kingdom once the Respondent and the child have returned to the United Kingdom.

D. Petitioner does not know of any person or institution not a party to this proceeding who has physical custody of the child or claims to have rights of parental respon-

sibilities or legal custody or physical custody of, or visitation or parenting time with, the child.

Dated: New York, New York
November 9, 2010

/s/

Sharon Marie Mills
Shawn Patrick Regan
Hunton & Williams LLP
200 Park Avenue
New York, NY 10166
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smills@hunton.com
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Attorneys for Petitioner

Exhibit A

Appendix A

LETTER OF TRANSMITTAL

THE WHITE HOUSE, October 30, 1985.

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Hague Convention on the Civil Aspects of International Child Abduction, adopted on October 24, 1980 by the Fourteenth Session of the Hague Conference on Private International Law and opened for signature on October 25, 1980.

The Convention is designed to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country. It also seeks to facilitate the exercise of visitation rights across international borders. The Convention reflects a worldwide concern about the harmful effects on children of parental kidnapping and a strong desire to fashion an effective deterrent to such conduct.

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the

abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.

The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek judicial remedy directly without involving the Central Authority of the country where the child is located.

The Convention would represent an important addition to the State and Federal laws currently in effect in the United States that are designed to combat parental kidnapping—specifically, the Uniform Child Custody Jurisdiction Act now in effect in every State in the country, the Parental Kidnapping Prevention Act of 1980, the 1982 Missing Children Act and the Missing Children's Assistance Act. It would significantly improve the chances a parent in the United States has of recovering a child from a foreign Contracting State. It also provides a clear-cut method for parents abroad to apply for the return of children who

have been wrongfully taken to or retained in this country. In short, by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that now confront parents in international child abduction cases.

Federal legislation will be submitted to provide for the smooth implementation of the Convention within the United States. This legislation will be consistent with the spirit and intent of recent congressional initiatives dealing with the problem of interstate child abduction and missing children.

United States ratification of the Convention is supported by the American Bar Association. The authorities of many States have indicated a willingness to do their part to assist the Federal government in carrying out the mandates of the Convention.

I recommend that the Senate give early and favorable consideration to the Convention and accord its advice and consent to ratification, subject to the reservations described in the accompanying report of the Secretary of State.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, October 4, 1985.

The PRESIDENT, The White House.

THE PRESIDENT: I have the honor to submit to you the Hague Convention on the Civil Aspects of International Child Abduction with the recom-

mendation that it be transmitted to the Senate for its advice and consent to ratification.

The Convention was adopted on October 24, 1980 at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session by unanimous vote of twenty-three member states of that organization. The Convention was opened for signature on October 25, 1980, at which time it was signed by Canada, France, Greece and Switzerland. It was signed on behalf of the United States on December 23, 1981, and has also been signed by Belgium and Portugal. The Convention is in force for France, Portugal, Switzerland and most parts of Canada.

The Convention stemmed from a proposal first advanced at a Hague Conference Special Commission meeting in 1976 that the Conference prepare a treaty responsive to the global problem of international child abduction. The overriding objective was to spare children the detrimental emotional effects associated with transnational parental kidnapping.

The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3).

Thus, a custody decree is not a pre-requisite to invoking the Convention with a view to securing the child's return. By promptly restoring the status quo ante, subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Each country must establish at least one national Central Authority primarily to process incoming and outgoing requests for assistance in securing the return of a child or the exercise of visitation rights (Article 6). In the United States the Central Authority is to be located in an existing agency of the federal government which will, however, need to rely on state and local facilities, including the Federal Parent Locator Service and the private bar, in carrying out the measures listed in Article 7 of the Convention. These measures include best efforts to locate abducted or retained children, explore possibilities for their voluntary return, facilitate provision of legal services in connection with judicial proceedings, and coordinate arrangements for the child's return travel (Article 7).

Articles 11-17 are the major provisions governing legal proceedings for the return of an abducted child. Under the Convention, if a proceeding is brought less than a year from the date of the removal or retention and the court finds that the conduct was wrongful, the court is under a treaty obligation to order the child returned. When proceedings are brought a year or more after the date

of the removal or retention, the court is still obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment (Article 12).

Although the Convention ceases to apply as soon as a child reaches sixteen years of age (Article 4), it does not limit the power of appropriate authorities to order the return of an abducted or wrongfully retained child at any time pursuant to other laws or procedures that may make return in the absence of a treaty obligation possible (Article 18).

Articles 13 and 20 enumerate those exceptional circumstances under which the court is not obligated by the Convention to order the child returned. The person opposing return of the child bears the burden of proving that: (1) custody rights were not actually being exercised at the time of the removal or retention by the person seeking return or the person seeking return had consented to or subsequently acquiesced in the removal or retention; or (2) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A court also has discretion to refuse to order a child returned if it finds that the child objects to being returned and has reached an age or degree of maturity making it appropriate to consider his or her views (Article 13). A court may also deny a request to return a child if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). Unless one of the enumerated exceptions to the return obligation is deemed to apply, courts in Contracting

States will be under a treaty obligation to order a child returned.

Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the "access rights" of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for "organizing or securing the effective exercise of rights of access." The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation periods. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad.

If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the Convention will be effective in returning children in individual cases, the full extent of its success may never by quantifiable as an untold number of potential parental kidnappings may have been deterred.

This country's participation in the development of the Convention was a logical extension of U.S. membership in the Hague Conference on Private

International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population. In response to the public outcry over parental kidnapping, all states and the District of Columbia enacted the Uniform Child Custody Jurisdiction Act (UCCJA), and Congress has enacted the Parental Kidnapping Prevention Act (PKPA), the Missing Children Act, and the Missing Children's Assistance Act. These statutes address almost exclusively problems associated with inter-state parental kidnapping. The Convention will expand the remedies available to victims of parental kidnapping from or to the United States.

The Convention will be of great assistance to parents in the United States whose children are wrongfully taken to or retained in other Contracting States. Such persons now have no choice but to utilize laws and procedures applicable to recognition and enforcement of foreign custody decrees in the country in which the child is located. It is often necessary to retain a foreign lawyer and to apply or reapply for custody to a foreign court, which typically pits the U.S. petitioner against the abducting parent who may have his or her origins in that foreign country and may thus have the benefit of defending the custody suit in what may be a friendly forum. The Convention will be especially meaningful to parents whose children are abducted before U.S. custody orders have been issued because return proceedings under the Convention are not contingent upon the existence of such orders.

At any given time during the past several years, about half of the several hundred requests to the Department of State for assistance in recovering children taken out of the United States have involved abductions to countries which participated in the preparation and negotiation of the Hague Convention. This suggests that U.S. ratification of the Convention, and its ultimate ratification by many of those other countries, is likely to benefit a substantial number of future victim children and parents residing in the United States.

For parents residing outside the United States whose children have been wrongfully taken to or retained in this country, the Convention will likewise serve as a vehicle for prompt return. In such cases involving violations of existing foreign court orders, the victim parent outside the United States may either invoke the Convention or seek return of the child in connection with an action for recognition of the foreign custody decree pursuant to the UCCJA or other available means. The Convention will be especially advantageous in predecree abduction cases where no court order exists that may be enforced under the UCCJA.

The Convention has received widespread support. The Secretary of State's Advisory Committee on Private International Law—on which ten major national legal organizations interested in international efforts to unify private law are represented—has endorsed the Convention for U.S. ratification. The House Delegates of the American Bar Association adopted a resolution in February, 1981 urging U.S. signature and ratification of the Convention. U.S. ratification is also supported by

the Department of Justice and the Department of Health Services. In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.

The Department believes that federal legislation will be needed fully to give effect to various provisions of the Convention. Draft legislation is being prepared for introduction in both houses of Congress. The United States instrument of ratification would be deposited only after satisfactory legislation has been enacted.

I recommend that the United States enter two reservations at the time of deposit of its instrument of ratification, both of which are specifically permitted by the Convention.

(1) The United States should enter a reservation to ensure that all documents sent to the U.S. Central Authority in a foreign language are accompanied by a translation into English. The reservation should read:

> Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the United States Central Authority should be accompanied by their translation into English.

(2) The second reservation should read:

Pursuant to the third paragraph of Article 26, the Unite States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

It is hoped that the Senate will promptly consider this Convention and give its advice and consent to its ratification by the United States.

Respectfully submitted,

GEORGE P. SHULTZ

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or

administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who has habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purpose of this Convention—

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which

applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudices to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the pro-

ceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the

return of the child if the person, institution or other body which opposes its return establishes that—

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the

State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting State shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in

the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to

which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing of protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both,

in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually residence within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisors or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Con-

vention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting state, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specific by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of

children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the applicable of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to

derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention hall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units, or only to one or more of them and may modify this declaration by submitted another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and leg-

islative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any state may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of

the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 30 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Article 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Appendix C—Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction consists of six chapters containing forty-five articles. While not formally incorporated into the Convention, a model form was prepared when the Convention was adopted by the Hague Conference on Private International Law and was recommended for use in making application for the return of wrongfully removed or retained children. A copy of that form is annexed to this Legal Analysis. (The form to be used for the return of children from the United States may seek additional information.)

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Guide to Terminology Used in the Legal Analysis

"Abduction" as used in the Convention title is not intended in a criminal sense. That term is shorthand for the phrase "wrongful removal or retention" which appears throughout the text, beginning with the preambular language and Article 1. Generally speaking, *"wrongful removal"* refers to the taking of a child from the person who was actually exercising custody of the child. *"Wrongful retention"* refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period. "Wrongful retention" is not intended by this Convention to cover refusal by the custodial parent to permit visitation by the other parent. Such obstruction of visitation may be redressed in accordance with Article 21.

The term *"abductor"* as used in this analysis refers to the person alleged to have wrongfully removed or retained a child. This person is also referred to as the "alleged wrongdoer" or the "respondent."

The term *"person"* as used in this analysis includes the person, institution or other body who (or which) actually exercised custody prior to the abduction and is seeking the child's return. The "person" seeking the child's return is also referred to as "applicant" and "petitioner."

The terms *"court"* and *"judicial authority"* are used throughout the analysis to mean both judicial and administrative bodies empowered to make

decisions on petitions made pursuant to this Convention. "Judicial decree" and "court order" likewise include decisions made by courts or administrative bodies.

"Country of origin" and *"requesting country"* refer to the child's country ("State") of habitual residence prior to the wrongful removal or retention. *"Country addressed"* refers to the country ("State") where the child is located or the country to which the Child is believed to have been taken. It is in that country that a judicial or administrative proceeding for return would be brought.

"Access rights" correspond to *"visitation rights."*

References to the "reporter" are to Elisa Perez-Vera, the official Hague Conference reporter for the Convention. Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it. It is referred to herein as the "Perez-Vera Report." The Perez-Vera Report appears in *Actes et documents de la Quatorzieme Session (1980), Volume III, Child Abduction*, edited by the Permanent Bureau of the Hague Conference on Private International Law, The Hague, Netherlands. (The volume may be ordered from the Netherlands Government Printing and Publishing Office, 1 Christoffel Plantijnstraat, Postbox 20014, 2500 EA The Hague, Netherlands.)

I. Children Protected by the Convention

A fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions by persons bent on

obtaining their physical and/or legal custody. Children who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore. Contracting States are obliged by Article 2 to take all appropriate measures to implement the objectives of the Convention as set forth in Article 1: (1) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. While these objectives are universal in their appeal, the Convention does not cover all children who might be victims of wrongful takings or retentions. A threshold inquiry, therefore, is whether the child who has been abducted or retained is subject to the Convention's provisions. Only if the child falls within the scope of the Convention will the administrative and judicial mechanisms of the Convention apply.

A. Age

The Convention applies only to children under the age of sixteen (16). Even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen.

Article 4.

Absent action by governments to expand coverage of the Convention to children aged sixteen and above pursuant to Article 36, the Convention itself

is unavailable as the legal vehicle for securing return of a child sixteen or older. However, it does not bar return of such child by other means.

Articles 18, 29 and 34 make clear that the Convention is a nonexclusive remedy in cases of international child abduction. Article 18 provides that the Convention does not limit the Power of a judicial authority to order return of a child at any time, presumably under other laws, procedures or comity, irrespective of the child's age. Article 29 permits the person who claims a breach of custody or access rights, as defined by Articles 3 and 21, to bypass the Convention completely by invoking any applicable laws or procedures to secure the child's return. Likewise, Article 34 provides that the Convention shall not restrict the application of any law in the State addressed for purposes of obtaining the child's return or for organizing visitation rights. Assuming such laws are not restricted to children under sixteen, a child sixteen or over may be returned pursuant to their provisions.

Notwithstanding the general application of the Convention to children under sixteen, it should be noted that the wishes of mature children regarding their return are not ignored by the Convention. Article 13 permits, but does not require, the judicial authority to refuse to order the child returned if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."The role of the child's preference in return proceedings is discussed further at III.I(2)(d), *infra*.

B. Residence

In order for the Convention to apply the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Article 4, In practical terms, the Convention may be invoked only where the child was habitually resident in a Contracting State and taken to or retained in another Contracting State. Accordingly, child abduction and retention cases are actionable under the Convention if they are international in nature (as opposed to interstate), and provided the Convention has entered into force for both countries involved. See discussion of Article 38, VI.B, *infra*.

To illustrate, take the case of a child abducted to California from his home in New York. The Convention could not be invoked to secure the return of such child. This is true even if one of the child's parents is an American citizen and the other a foreign national. The Uniform Child Custody Jurisdiction Act (UCCJA) and/or the Parental Kidnapping Prevention Act (PKPA), domestic state and federal law, respectively, would govern the return of the child in question. If the same child were removed from New York to Canada, application under the Convention could be made to secure the child's return provided the Convention had entered into force both for the United States and the Canadian province to which the child was taken. An alternative remedy might also lie under other Canadian law. If the child had been removed from Canada and taken to the United States, the aggrieved custodial parent in Canada could seek to secure the child's return by petitioning for enforcement of a Canadian custody

order pursuant to the UCCJA, or by invoking the Convention, or both.

C. Tuning/Cases Covered

Article 35 states that the Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. Following a strict interpretation of that Article, the Convention will not apply to a child who is wrongfully shifted from one Contracting State to another if the wrongful removal or retention occurred before the Convention's entry into force in those States. However, under a liberal interpretation Article 35 could be construed to cover wrongful removal or retention cases which began before the Convention took effect but which continued and were ongoing after its entry into force.

D. Effect of Custody Order Concerning the Child

1. Existing Custody Orders

Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the alleged wrongdoer. This is true whether the decision as to custody was made, or is entitled to recognition, in the State to which the child has been taken. Under Article 17 that State cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer made by one of its own courts or by the courts of another country. This provision is intended to ensure, *inter alia*, that the Con-

vention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.

Thus, under Article 17 the person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's order. Nor may the alleged wrongdoer rely upon a stale decree awarding him or her custody, the provisions of which have been derogated from subsequently by agreement or acquiescence of the parties, to prevent the child's return under the Convention. Article 3.

It should be noted that Article 17 does permit a court to take into account the reasons underlying an existing custody decree when it applies the Convention.

2. *Pre-Decree Removals or Retentions*

Children who are wrongfully removed or retained prior to the entry of a custody order are protected by the Convention. There need not be a custody order in effect in order to invoke the Convention's return provisions. Accordingly, under the Convention a child will be ordered returned to the person with whom he or she was habitually resident in pre-decree abduction cases as well as in cases involving violations of existing custody orders.

Application of the Convention to pre-decree cases comes to grips with the reality that many children are abducted or retained long before custody actions have been initiated. In this manner a

child is not prejudiced by the legal inaction of his or her physical custodian, who may not have anticipated the abduction, and the abductor is denied any legal advantage since the child is subject to the return provisions of the Convention.

The Convention's treatment of pre-decree abduction cases is distinguishable from the Council of Europe's Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France in November 1979 ("Strasbourg Convention"), and from domestic law in the United States, specifically the UCCJA and the PKPA, all of which provide for enforcement of custody decrees. Although the UCCJA and PKPA permit enforcement of a decree obtained by a parent in the home state after the child has been removed from that state, in the absence of such decree the enforcement provisions of those laws are inoperative. In contrast to the restoration of the *legal* status quo ante brought about by application of the UCCJA, the PKPA, and the Strasbourg Convention, the Hague Convention seeks restoration of the *factual* status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.

Pre-decree abductions are discussed in greater detail in the section dealing with actionable conduct. *See* II.B(2)(c)(i).

II. Conduct Actionable Under the Convention

A. International Child Abduction not Criminal: Hague Convention Distinguished From Extradition Treaties

Despite the use of the term "abduction" in its title, the Hague Convention is not an extradition treaty. The conduct made actionable by the Convention—the wrongful removal or retention of children—is wrongful not in a criminal sense but in a civil sense.

The Hague Convention establishes civil procedures to secure the return of so-called "abducted" children. Article 12. In this manner the Hague Convention seeks to satisfy the overriding concern of the aggrieved parent. The Convention is not concerned with the question of whether the person found to have wrongfully removed or retained the child returns to the child's country of habitual residence once the child has been returned pursuant to the Convention. This is in contrast to the criminal extradition process which is designed to secure the return of the fugitive wrong-doer. Indeed, when the fugitive-parent is extradited for trial (or to serve a criminal sentence, there is no guarantee that the abducted child will also be returned.

While it is uncertain whether criminal extradition treaties will be routinely invoked in international custody cases between countries for which the Hague Convention is in force, nothing in the Convention bars their application or use.

B. Wrongful Removal or Retention

The Convention's first stated objective is to secure the prompt return of children who are wrongfully removed from or retained in any Contracting State. Article 1(a). (The second stated objective, i.e., to ensure that rights of custody and of access under the law of one Contracting State are effectively exercised in other Contracting States (Article 1(b)), is discussed under the heading "Access Rights," V., infra.) The removal or retention must be wrongful within the meaning of Article 3, as further clarified by Article 5(a), in order to trigger the return procedures established by the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

> (a) it is in breach of custody rights attributed to a person, an institution or another body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

This Article is a cornerstone of the Convention. It is analyzed by examining two questions:

> 1.) Who holds rights protected by the Convention (or, with respect to whom is the removal or retention deemed to be wrongful?); and

2.) What are the factual and legal elements of a wrongful removal or retention?

1. Holders of Rights Protected by the Convention

(a) *"Person, institution or other body".* While the child is the ultimate beneficiary of the Convention's judicial and administrative machinery, the child's role under the Convention is passive. In contrast, it is up to the "person, institution or other body" (hereinafter referred to simply as "the person") who "actually exercised" custody of the child prior to the abduction, or who would have exercised custody but for the abduction, to invoke the Convention to secure the child's return. Article 3 (a), (b). It is this person who holds the rights protected by the Convention and who has the right to seek relief pursuant to its terms.

Since the vast majority of abduction cases arises in the context of divorce or separation, the person envisioned by Article 3(a) most often will be the child's parent. The typical scenario would involve one parent taking a child from one Contracting State to another Contracting State over objections of the parent with whom the child had been living.

However, there may be situations in which a person other than a biological parent has actually been exercising custody of the child and is therefore eligible to seek the child's return pursuant to the Convention. An example would be a grandparent who has had physical custody of a child following the death of the parent with whom the child had been residing. If the child is subsequently removed from the custody of the grandparent by the surviving parent, the aggrieved

grandparent could invoke the Convention to secure the child's return. In another situation, the child may be in the care of foster parents. If custody rights exercised by the foster parents are breached, for instance, by abduction of the child by its biological parent, the foster parents could invoke the Convention to secure the child's return.

In the two foregoing examples (not intended to be exhaustive) a family relationship existed between the victim-child and the person who had the right to seek the child's return. However, institutions such as public or private child care agencies also may have custody rights the breach of which would be remediable under the Convention. If a natural parent relinquishes parental rights to a child and the child is subsequently placed in the care of an adoption agency, that agency may invoke the Convention to recover the child if the child is abducted by its parent(s).

(b) *"Jointly or alone"*. Article 3 (a) and (b) recognize that custody rights may be held either jointly or alone. Two persons, typically mother and father, can exercise joint custody, either by court order following a custody adjudication, or by operation of law prior to the entry of a decree. The Convention does not distinguish between these two situations, as the commentary of the Convention reporter indicates:

Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected

by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties. Perez-Vera Report, paragraph 71 at 447-448.

Article 3(a) ensures the application of the Convention to pre-decree abductions, since it protects the rights of a parent who was exercising custody of the child jointly with the abductor at the time of the abduction, before the issuance of a custody decree.

2. "Wrongful Removal or Retention" Defined

The obligation to return an abducted child to the person entitled to custody arises only if the removal or the retention is wrongful within the meaning of the Convention. To be considered wrongful, certain factual and legal elements must be present.

(a) *Breach of "custody rights".* The removal or retention must be in breach of "custody rights," defined in Article 5(a) as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

Accordingly, a parent who sends his or her child to live with a caretaker has not relinquished cus-

tody rights but rather has exercised them within the meaning of the Convention. Likewise, a parent hospitalized for a protracted period who places the child with grandparents or other relatives for the duration of the illness has effectively exercised custody.

(b) *"Custody rights" determined by law of child's habitual residence.* In addition to including the right to determine the child's residence (Article 5(a)), the term "custody rights" covers a collection of rights which take on more specific meaning by reference to the law of the country in which the child was habitually resident immediately before the removal or retention. Article 3(a). Nothing in the Convention limits this "law" to the internal law of the State of the child's habitual residence. Consequently, it could include the laws of another State if the choice of law rules in the State of habitual residence so indicate.

If a country has more than one territorial unit, the habitual residence refers to the particular territorial unit in which the child was resident, and the applicable laws are those in effect in that territorial unit. Article 31. In the United States, the law in force in the state in which a child was habitually resident (as possibly preempted by federal legislation enacted in connection with U.S. ratification of the Convention) would be applicable for the determination as to whether a removal or retention is wrongful.

Articles 32 and 33 also control, respectively, how and whether the Convention applies in States with more than one legal system. Perez-Vera Report, paragraphs 141 and 142 at 470.

(c) *Sources of "custody rights".* Although the Convention does not exhaustively list all possible sources from which custody rights may derive, it does identify three sources. According to the final paragraph of Article 3, custody rights may arise: (1) by operation of law; (2) by reason of a judicial or administrative decision; or (3) by reason of an agreement having legal effect under the law of that State.

i. *Custody rights arising by operation of law.* Custody rights which arise by operation of law in the State of habitual residence are protected; they need not be conferred by court order to fall within the scope of the Convention. Article 3. Thus, a person whose child is abducted prior to the entry of a custody order is not required to obtain a custody order in the State of the child's habitual residence as a prerequisite to invoking the Convention's return provisions.

In the United States, as a general proposition both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other's equal rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. (See excerpts from Perez-Vera Report quoted at II.B.1(b), *supra*.) Thus, a parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry

of a decree, in the absence of an agreement between the parties the question of wrongfulness would be resolved by looking to the law of the child's country of habitual residence.

Although a custody decree is not needed to invoke the Convention, there are two situations in which the aggrieved parent may nevertheless benefit by securing a custody order, assuming the courts can hear swiftly a petition for custody. First, to the extent that an award of custody to the left-behind parent (or other person) is based in part upon an express finding by the court that the child's removal or retention was wrongful within the meaning of Article 3, the applicant anticipates a possible request by the judicial authority applying the Convention, pursuant to Article 15, for a court determination of wrongfulness. This may accelerate disposition of a return petition under the Convention. Second, a person outside the United States who obtains a custody decree from a foreign court subsequent to the child's abduction, after notice and opportunity to be heard have been accorded to the absconding parent, may be able to invoke either the Convention or the UCCJA, or both, to secure the child's return from the United States. The UCCJA may be preferable inasmuch as its enforcement provisions are not subject to the exceptions contained in the Convention.

ii. *Custody rights arising by reason of judicial or administrative decision.* Custody rights embodied in judicial or administrative decisions fall within the Convention's scope. While custody determinations in the United States are made by state courts, in some Contracting States, notably the

Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody including the allocation of custody and visitation rights. Hence the reference to "administrative decisions" in Article 3.

The language used in this part of the Convention can be misleading. Even when custody rights are conferred by court decree, technically speaking the Convention does not mandate recognition and enforcement of that decree. Instead, it seeks only to restore the factual custody arrangements that existed prior to the wrongful removal or retention (which incidentally in many cases will be the same as those specified by court order).

Finally, the court order need not have been made by a court in the State of the child's habitual residence. It could be one originating from a third country. As the reporter points out, when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree have been formally recognized. Perez-Vera Report, paragraph 69 at 447.

iii. *Custody rights arising by reason of agreement having legal effect.* Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. The only limitation is that the agreement have legal effect under the law of the child's habitual residence.

Comments of the United States with respect to language contained in an earlier draft of the Convention (*i.e.*, that the agreement "have the force of law") shed some light on the meaning of the expression "an agreement having legal effect". In

the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgment. *Actes et documents de la Quatorzieme Session, (1980) Volume III. Child Abduction,* Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision:

As regards the definition of an agreement which has "legal effect" in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Perez-Vera Report, paragraph 70 at 447.

(d) *"Actually exercised".* The most predictable fact pattern under the Convention will involve the abduction of a child directly from the parent who was actually exercising physical custody at the time of the abduction.

To invoke the Convention, the holder of custody rights must allege that he or she actually exercised those rights at the time of the breach or would have exercised them but for the breach. Article 3(b). Under Article 5, custody rights are defined to include the right to determine the child's place of residence. Thus, if a child is abducted from the physical custody of the person in whose care the child has been entrusted by the custodial parent who was "actually exercising" custody, it is the parent who placed the child who may make application under the Convention for the child's return.

Very little is required of the applicant in support of the allegation that custody rights have

actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child. Perez-Vera Report, paragraph 73 at 448. The Report points out the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to "the grounds on which the applicant's claim for return of the child is based." *Id.*

In the scheme of the Convention it is presumed that the person who has custody actually exercised it. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation. Here, again, the reporter's comments are insightful:

Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the "abductor" if he wishes to prevent the return of the child.) Perez-Vera Report paragraph 73 at 449.

III. Judicial Proceedings for Return of Child

A. Right to Seek Return

When a person's custody rights have been breached by the wrongful removal or retention of the child by another, he or she can seek return of the child pursuant to the Convention. This right of

return is the core of the Convention. The Convention establishes two means by which the child may be returned. One is through direct application by the aggrieved person to a court in the Contracting State to which the child has been taken or in which the child is being kept. Articles 12, 29. The other is through application to the Central Authority to be established by every Contracting State. Article 8. These remedies are not mutually exclusive; the aggrieved person may invoke either or both of them. Moreover, the aggrieved person may also pursue remedies outside the Convention. Articles 18, 29 and 34. This part of the report describes the Convention's judicial remedy in detail. The administrative remedy is discussed in IV, *infra*.

Articles 12 and 29 authorize any person who claims a breach of custody rights within the meaning of Article 3 to apply for the child's return directly to the judicial authorities of the Contracting State where the child is located.

A petition for return pursuant to the Convention may be filed any time after the child has been removed or retained up until the child reaches sixteen. While the window of time for filing may be wide in a particular case without threat of technically losing rights under the Convention, there are numerous reasons to commence a return proceeding promptly if the likelihood of a voluntary return is remote. The two most crucial reasons are to preclude adjudication of custody on the merits in a country other than the child's habitual residence (see discussion of Article 16, *infra*) and to maximize the chances for the child's return by reducing the alleged abductor's opportunity to

establish that the child is settled in a new environment (see discussion of Article 12, *infra*).

A petition for return would be made directly to the appropriate court in the Contracting State where the child is located. If the return proceedings are commenced less than one year from the date of the wrongful removal or retention, Article 12 requires the court to order the return of the child forthwith. If the return proceedings are commenced a year or more after the alleged wrongful removal or retention, the court remains obligated by Article 12 to order the child returned unless it is demonstrated that the child is settled in its new environment.

Under Article 29 a person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. Indeed, Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying other laws and procedures conducive to that end.

Accordingly, a parent seeking return of a child from the United States could petition for return pursuant to the Convention, or in the alternative or additionally, for enforcement of a foreign court order pursuant to the UCCJA. For instance, an English father could petition courts in New York either for return of his child under the Convention and/or for recognition and enforcement of his British custody decree pursuant to the UCCJA. If he prevailed in either situation, the respective court could order the child returned to him in England. The father in this illustration may find the UCCJA remedy swifter than invoking the Convention for the child's return because it is not sub-

ject to the exceptions set forth in the Convention, discussed at III.I., *infra*.

B. Legal Advice and Costs

Article 25 provides for the extension of legal aid and advice to foreign applicants on the same basis and subject only to the same eligibility requirements as for nationals of the country in which that aid is sought.

Article 26 prohibits Central Authorities from charging applicants for the cost and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. This provision will be of no help to an applicant, however, if the Contracting State in question has made a reservation in accordance with Articles 26 and 42 declaring that it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

It is expected that the United States will enter a reservation in accordance with Articles 26 and 42. This will place at least the initial burden of paying for counsel and legal proceedings on the applicant rather than on the federal government. Because the reservation is nonreciprocal, use of it will not automatically operate to deny applicants from the United States free legal services and judicial proceedings in other Contracting States. However, if the Contracting State in which the child is located has itself made use of the reservation in question, the U.S. applicant will not be eligible for cost-free legal representation and court proceedings. For more information on costs, including the possibil-

ity that the petitioner's costs may be levied on the abductor if the child is ordered returned, see III.J 2 and IV.C (d) of this analysis.

C. Pleading Requirements

The Convention does not expressly set forth pleading requirements that must be satisfied by an applicant who commences a judicial return proceeding. In contrast, Article 8 sets forth the basic requirements for an application placed before a Central Authority (discussed IV.C(1), *infra*) for the return of the child. Since the objective is identical—the child's return—whether relief is sought through the courts or through intercession of the Central Authority, it follows that a court should be provided with at least as much information as a Central Authority is to be provided in a return application filed in compliance with Article 8. To ensure that all necessary information is provided, the applicant may wish to append to the petition to the court a completed copy of the recommended model form for return of a child (see Annex A to this analysis).

In addition to providing the information set forth in Article 8, the petition for return should allege that the child was wrongfully removed or retained by the defendant in violation of custody rights that were actually being exercised by the petitioner. The petition should state the source of the custody rights, the date of the wrongful conduct, and the child's age at that time. In the prayer for relief, the petitioner should request the child's return and an order for payment by the abducting or retaining parent of all fees and expenses incurred to secure the child's return.

Any return petition filed in a court in the United States pursuant to the Convention must be in English. Any person in the United States who seeks return of a child from a foreign court must likewise follow the requirements of the foreign state regarding translation of legal documents. See Perez-Vera Report, paragraph 132 at page 467.

D. Admissibility of Evidence

Under Article 30, any application submitted to the Central Authority or petition submitted to the judicial authorities of a Contracting State, and any documents or information appended thereto, are admissible in the courts of the State. Moreover, under Article 23, no legalization or similar formalities may be required. However, authentication of private documents may be required. According to the official report, "any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision." Perez-Vera Report, paragraph 131 at page 467.

E. Judicial Promptitude/Status Report

Once an application for return has been filed, the court is required by Article 11 "to act expeditiously in proceedings for the return of children." To keep matters on the fast track, Article 11 gives the applicant or the Central Authority of the requested State the right to request a statement from the court of the reasons for delay if a decision on the application has not been made within six weeks from the commencement of the proceedings.

F. Judicial Notice

In ascertaining whether there has been a wrongful removal or retention of a child within the meaning of Article 3, Article 14 empowers the court of the requested State to take notice directly of the law and decisions in the State of the child's habitual residence. Standard procedures for the proof of foreign law and for recognition of foreign decisions would not need to be followed and compliance with such procedures is not to be required.

G. Court Determination of "Wrongfulness"

Prior to ordering a child returned pursuant to Article 12, Article 15 permits the court to request the applicant to obtain from the authorities of the child's State of habitual residence a decision or other determination that the alleged removal or retention was wrongful within the meaning of Article 3. Article 15 does not specify which "authorities" may render such a determination. It therefore could include agencies of government (*e.g.*, state attorneys general) and courts. Central Authorities shall assist applicants to obtain such a decision or determination. This request may only be made where such a decision or determination is obtainable in that State.

This latter point is particularly important because in some countries the absence of the defendant-abductor and child from the forum makes it legally impossible to proceed with an action for custody brought by the left-behind parent. If an adjudication in such an action were a prerequisite to obtaining a determination of wrongfulness, it would be impossible for the peti-

tioner to comply with an Article 15 request. For this reason a request for a decision or determination on wrongfulness can not be made in such circumstances consistent with the limitation in Article 15. Even if local law permits an adjudication of custody in the absence of the child and defendant (*i.e.*, post-abduction) or would otherwise allow a petitioner to obtain a determination of wrongfulness, the provisions of Article 15 will probably not be resorted to routinely. That is so because doing so would convert the purpose of the Convention from seeking to restore the *factual* status quo prior to an abduction to emphasizing substantive legal relationships.

A further consideration in deciding whether to request an applicant to comply with Article 15 is the length of time it will take to obtain the required determination. In countries where such a determination can be made only by a court, if judicial dockets are seriously backlogged, compliance with an Article 15 order could significantly prolong disposition of the return petition, which in turn would extend the time that the child is kept in a state of legal and emotional limbo. If "wrongfulness" can be established some other way, for instance by taking judicial notice of the law of the child's habitual residence as permitted by Article 14, the objective of Article 15 can be satisfied without further prejudice to the child's welfare or undue delay of the return proceeding. This would also be consistent with the Convention's desire for expeditious judicial proceedings as evidenced by Article 11.

In the United States, a left-behind parent or other claimant can petition for custody after the

child has been removed from the forum. The right of action is conferred by the UCCJA, which in many states also directs courts to hear such petitions expeditiously. The result of such proceeding is a temporary or permanent custody determination allocating custody and visitation rights, or joint custody rights, between the parties. However, a custody determination on the merits that makes no reference to the Convention may not by itself satisfy an Article 15 request by a foreign court for a determination as to the wrongfulness of the conduct within the meaning of Article 3. Therefore, to ensure compliance with a possible Article 15 request the parent in the United States would be well-advised to request an explicit finding as to the wrongfulness of the alleged removal or retention within the meaning of Article 3 retention within the meaning of Article 3 in addition to seeking custody.

H. Constraints Upon Courts in Requested States in Making Substantive Custody Decisions

Article 16 bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims once it has received notice of the removal or retention of the child. The constraints continue either until it is determined that the child is not to be returned under the Convention, or it becomes evident that an application under the Convention will not be forthcoming within a reasonable time following receipt of the notice.

A court may get notice of a wrongful removal or retention in some manner other than the filing of

a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.

No matter how notice may be given, once the tribunal has received notice, a formal application for the child's return pursuant to the Convention will normally be filed promptly to avoid a decision on the merits from being made. If circumstances warrant a delay in filing a return petition, for instance pending the outcome of private negotiations for the child's return or interventions toward that end by the Central Authority, or pending determination of the location of the child and alleged abductor, the aggrieved party may nevertheless wish to notify the court as to the reason(s) for the delay so that inaction is not viewed as a failure to proceed under the Convention.

I. Duty to Return not Absolute

The judicial duty to order return of a wrongfully removed or retained child is not absolute. Temporal qualifications on this duty are set forth in Articles 12, 4 and 35. Additionally, Articles 13 and 20 set forth grounds upon which return may be denied.

1. Temporal Qualifications

Articles 4, 35 and 12 place time limitations on the return obligation.

(a) *Article 4.* Pursuant to Article 4, the Convention ceases to apply once the child reaches age sixteen. This is true regardless of when return

proceedings were commenced and irrespective of their status at the time of the child's sixteenth birthday. *See* I.A., *supra.*

(b) *Article 35.* Article 35 limits application of the Convention to wrongful removals or retentions oocurring after its entry into force between the two relevant Contracting States. *But see* I.C., *supra.*

(c) *Article 12.* Under Article 12, the court is not obligated to return a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention *and* it is demonstrated that the child is settled in its new environment. The reporter indicates that "[T]he provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child . . ." Perez-Vera Report, paragraph 109 at page 459.

If the Convention is to succeed in deterring abductions, the alleged abductor must not be accorded preferential treatment by courts in his or her country of origin, which, in the absence of the Convention, might be prone to favor "home forum" litigants. To this end, nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof. Moreover, any claims made by the person resisting the child's return will be considered in light of evidence presented by the applicant concerning the child's contacts with and ties to his or her State of habitual residence. The reason for the passage of time, which may have made it possible for the child to

form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

2. *Article 13 Limitations on the Return Obligation*

(a) *Legislative history.* In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies. Finally, the wording of each exception represents a compromise to accommodate the different legal systems and tenets of family law in effect in the countries negotiating the Convention,

the basic purpose in each case being to provide for an exception that is narrowly construed.

(b) *Non-exercise of custody rights.* Under Article 13(a), the judicial authority may deny an application for the return of a child if the person having the care of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. This exception derives from Article 3(b) which makes the Convention applicable to the breach of custody rights that were actually exercised at the time of the removal or retention, or which would have been exercised but for the removal or retention.

The person opposing return has the burden of proving that custody rights were not actually exercised at the time of the removal or retention, or that the applicant had consented to or acquiesced in the removal or retention. The reporter points out that proof that custody was not actually exercised does not form an exception to the duty to return if the dispossessed guardian was unable to exercise his rights precisely because of the action of the abductor. Perez-Vera Report, paragraph 115 at page 461.

The applicant seeking return need only allege that he or she was actually exercising custody rights conferred by the law of the country in which the child was habitually resident immediately before the removal or retention. The statement would normally include a recitation of the circumstances under which physical custody had been exercised, *i.e.*, whether by the holder of these rights, or by a third person on behalf of the actual holder of the custody rights. The applicant would

append copies of any relevant legal documents or court orders to the return application. *See* III, C., *supra*, and Article 8.

(c) *Grave risk of harm/intolerable situation.* Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.

This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.

(d) *Child's preference.* The third, unlettered paragraph of Article 13 permits the court to

decline to order the child returned if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. As with the other Article 13 exceptions to the return obligation, the application of this exception is not mandatory. This discretionery aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor. A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child.

(e) *Role of social studies.* The final paragraph of Article 13 requires the court, in considering a respondent's assertion that the child should not be returned, to take into account information relating to the child's social background provided by the Central Authority or other competent authority in the child's State of habitual residence. This provision has the dual purpose of ensuring that the court has a balanced record upon which to determine whether the child is to be returned, and preventing the abductor from obtaining an unfair advantage through his or her own forum selection with resulting ready access to evidence of the child's living conditions in that forum.

3. Article 20

Article 20 limits the return obligation of Article 12. It states: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the pro-

tection of human rights and fundamental freedoms."

The best explanation for this unique formulation is that the Convention might never have been adopted without it. The negotiating countries were divided on the inclusion of a public policy exception in the Convention. Those favoring a public policy exception believed that under some extreme circumstances not covered by the exceptions of Article 13 a court should be excused from returning a child to the country of habitual residence. In contrast, opponents of a public policy exception felt that such an exception could be interpreted so broadly as to undermine the fabric of the entire Convention.

A public policy clause was nevertheless adopted at one point by a margin of one vote. That clause provided: "Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed." To prevent imminent collapse of the negotiating process engendered by the adoption of this clause, there was a swift and determined move to devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.

The resulting language of Article 20 has no known precedent in other international agreements to serve as a guide in its interpretation. However, it should be emphasized that this exception, like the others, was intended to be restrictively interpreted and applied, and is not to be

used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed. Two characterizations of the effect to be given Article 20 are recited below for illumination.

The following explanation of Article 20 is excerpted from paragraph 118 of the Perez-Vera Report at pages 461-2:

It is significant that the possibility, acknowledged in *article 20,* that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter; it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with

these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

A.E. Anton, Chairman of the Commission on the Hague Conference on Private International Law that drafted the Convention, explained Article 20 in his article, "The Hague Convention on International Child Abduction," 30 I.C.L.Q. 537, 551-2 (July, 1981), as follows:

Its acceptance may in part have been due to the fact that it states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions. The reference in this provision to "the fundamental principles of the requested State" make it clear that the reference is not one to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which have been ratified or accepted by Contracting States. It is rather to the fundamental provisions of the law of the requested State in such matters . . . If the United Kingdom decides to ratify the Hague Covention, it will, of course, be for the implementing legislation or the courts to

specify what provisions of United Kingdom law come within the scope of Article 20. The Article, however, is merely permissive and it is to be hoped that States will exercise restraint in availing themselves of it.

4. Custody Order no Defense to Return

See I.D.1, *supra, for discussion of Article 17.*

J. Return of the Child

Assuming the court has determined that the removal or retention of the child was wrongful within the meaning of the Convention and that no exceptions to the return obligation have been satisfactorily established by the respondent, Article 12 provides that "the authority concerned shall order the return of the child forthwith." The Convention does not technically require that the child be returned to his or her State of habitual residence, although in the classic abduction case this will occur. If the petitioner has moved from the child's State of habitual residence the child will be returned to the petitioner, not the State of habitual residence.

1. Return Order not on Custody merits

Under Article 19, a decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. It follows that once the factual status quo ante has been restored, litigation concerning custody or visitation issues could proceed. Typically this will occur in the child's State of habitual residence.

2. Costs, Fees and Expenses Shifted to Abductor

In connection with the return order, Article 26 permits the court to direct the person who removed or retained the child to pay necessary expenses incurred by or on behalf of the applicant to secure the child's return, including expenses, costs incurred or payments made for locating the child, costs of legal representation of the applicant, and those of returing the child. The purposes underlying Article 26 are to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place. This fee shifting provision has counterparts in the UCCJA (sections 7(g), 8(c), 15(b)) and the PKPA *(28 U.S.C. 1738A* note).

IV. Central Authority

In addition to creating a judicial remedy for cases of wrongful removal and retention, the Convention requires each Contracting State to establish a Centeral Authority (hereinafter "CA") with the broad mandate of assisting applicants to secure the return of their children or the effective excercise of their visitation rights. Articles 1, 10, 21. The CA is expressly directed by Article 10 to take all appropriate measures to obtain the voluntary return of children. The role of the CA with respect to visitation rights is discussed in V., *infra*.

A. Establishment of Central Authority

Article 6 requires each Contracting State to designate a Central Authority to discharge the duties

enumerated in Articles 7, 9, 10, 11, 15, 21, 26, 27, and 28.

In France, the Central Authority is located within the Ministry of Justice. Switzerland has designated its Federal Justice Office as CA, and Canada has designated its Department of Justice; However, each Canadian province and territory in which the Convention has come into force has directed its Attorney General to serve as local CA for cases involving that jurisdiction.

In the United States it is very unlikely that the volume of cases will warrant the establishment of a new agency or office to fulfill Convention responsibilities. Rather, the duties of the CA will be carried out by an existing agency of the federal government with experience in dealing with authorities of other countries.

The Department of State's Office of Citizens Consular Services (CCS) within its Bureau of Consular Affairs will most likely serve as CA under the Hague Convention. CCS presently assists parents here and abroad with child custody-related problems within the framework of existing laws and procedures. The Convention should systematize and expedite CCS handling of requests from abroad for assistance in securing the return of children wrongfully abducted to or retained in the United States, and will provide additional tools with which CCS can help parents in the United States who are seeking return of their children from abroad.

The establishment of an interagency coordinating body is envisioned to assist the State Department in executing its functions as CA. This body is to include representatives of the Depart-

ments of State, Justice, and Health and Human Services.

In addition to the mandatory establishment of a CA in the national government, Contracting States are free to appoint similar entities in political subdivisions throughout the country. Rather than mandating the establishment of a CA in every state, it is expected that state governments in the United States will be requested on a case-by-case basis to render specified assistance, consistent with the Convention, aimed at resolving international custody and visitation disputes with regard to children located within their jurisdiction.

B. Duties

Article 7 enumerates the majority of the tasks to be carried out either directly by the CA or through an intermediary. The CA is to take "all appropriate measures" to execute these responsibilities. Although they are free to do so, the Convention does not obligate Contracting States to amend their internal laws to discharge Convention tasks more efficaciously. *See* Perez-Vera Report, paragraph 63 at page 444.

The following paragraphs of subsections of Article 7 of the Convention are couched in terms of the tasks and functions of the United States CA. The corresponding tasks and functions of the CA's in other States party to the Convention will be carried out somewhat differently in the context of each country's legal system.

Article 7(a). When the CA in the United States is asked to locate a child abducted from a foreign contracting State to this country, it would utilize

all existing tools for determining the whereabouts of missing persons. Federal resources available for locating missing persons include the FBI-operated National Crime Information Center (NCIC) computer (pursuant to Pub. L. No. 97-292, the Missing Children Act), the Federal Parent Locator Service (pursuant to section 9 of Pub. L. No. 96-611, the Parental Kidnapping Prevention Act) and the National Center for Missing and Exploited Children. If the abductor's location is known or suspected, the relevant state's Parent Locator Service or Motor Vehicle Bureau and the Internal Revenue Service, Attorney General and Secretary of Education may be requested to conduct field and/or record searches. Also at the state level, public or private welfare agencies can be called upon to verify discreetly any address information about the abductor that may be discovered.

Article 7(b). To prevent further harm to the child, the CA would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with that state's child abuse and neglect laws. The CA, either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required.

Article 7(c). The CA, either directly or through local public or private mediators, attorneys, social workers, or other professionals, would attempt to develop an agreement for the child's voluntary return and/or resolution of other outstanding issues. The obligation of the CA to take or cause to

be taken all appropriate measures to obtain the voluntary return of the child is so fundamental a purpose of this Convention that it is restated in Article 10. However, overtures to secure the voluntary return of a child may not be advisable if advance awareness by the abductor that the Convention has been invoked is likely to prompt further flight and concealment of the child. If the CA and state authorities are successful in facilitating a voluntary agreement between the parties, the applicant would have no need to invoke or pursue the Convention's judicial remedy.

Article 7(d). The CA in the United States would rely upon court personnel or social service agencies in the child's state of habitual residence to compile information on the child's social background for the use of courts considering exceptions to a return petition in another country in which an abducted or retained child is located. *See* Article 13.

Article 7(e). The CA in the United States would call upon U.S. state authorities to prepare (or have prepared) general statements about the law of the state of the child's habitual residence for purposes of application of the Convention in the country where the child is located, *i.e.*, to determine whether a removal or retention was wrongful.

Articles 7(f) and (g). In the United States the federal CA will not act as legal advocate for the applicant. Rather, in concert with state authorities and interested family law attorneys, the CA, through state or local bodies, will assist the applicant in identifying competent private legal counsel or, if eligible, in securing representation by a

Legal Aid or Legal Services lawyer. In some states, however, the Attorney General or local District Attorney may be empowered under state law to intervene on behalf of the applicant-parent to secure the child's return.

In some foreign Contracting States, the CA may act as the legal representative of the applicant for all purposes under the Convention.

Article 28 permits the CA to require written authorization empowering it to act on behalf of the applicant, or to designate a representative to act in such capacity.

Article 7(h). Travel arrangements for the return of a child from the United States would be made by the CA or by state authorities closest to the case in cooperation with the petitioner and/or interested foreign authorities. If it is necessary to provide short-term care for the child pending his or her return, the CA presumably will arrange for the temporary placement of the child in the care of the person designated for that purpose by the applicant, or, failing that, request local authorities to appoint a guardian, foster parent, etc. The costs of transporting the child are borne by the applicant unless the court, pursuant to Article 26, orders the wrongdoer to pay.

Article 7(i). The CA will monitor all cases in which its assistance has been sought. It will maintain files on the procedures followed in each case and the ultimate disposition thereof. Complete records will aid in determining how frequently the Convention is invoked and how well it is working.

C. Other Tasks

1. Processing Applications

Article 8 sets forth the required contents of a return application submitted to a CA, all of which are incorporated into the model form recommended for use when seeking a child's return pursuant to the Convention (see Annex A of this analysis). Article 8 further provides that an application for assistance in securing the return of a child may be submitted to a CA in either the country of the child's habitual residence or in any other Contracting State. If a CA receives an application with respect to a child whom it believes to be located in another Contracting State, pursuant to Article 9 it is to transmit the application directly to the appropriate CA and inform the requesting CA or applicant of the transmittal.

It is likely that an applicant who knows the child's whereabouts can expedite the return process by electing to file a return application with the CA in the country in which the child is located. The applicant who pursues this course of action may also choose to file a duplicate copy of the application for information purposes with the CA in his or her own country. Of course, the applicant may prefer to apply directly to the CA in his or her own country even when the abductor's location is known, and rely upon the CA to transfer documents and communicate with the foreign CA on his or her behalf. An applicant who does not know the whereabouts of the child will most likely file the return application with the CA in the child's State of habitual residence.

Under Article 27, a CA may reject an application if "it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded." The CA must promptly inform the CA in the requesting State, or the applicant directly, of its reasons for such rejection. Consistent with the spirit of the Convention and in the absence of any prohibition on doing so, the applicant should be allowed to correct the defects and refile the application.

Under Article 28, a CA may require the applicant to furnish a written authorization empowering it to act on behalf of the applicant, or designating a representative so to act.

2. Assistance in Connection With Judicial Proceedings

(a) *Request for status report.* When an action has been commenced in court for the return of a child and no decision has been reached by the end of six weeks, Article 11 authorizes the applicant or the CA of the requested State to ask the judge for a statement of the reasons for the delay. The CA in the country where the child is located may make such a request on its own initiative, or upon request of the CA of another Contracting State. Replies received by the CA in the requested State are to be transmitted to the CA in the requesting State or directly to the applicant, depending upon who initiated the request.

(b) *Social studies/background reports.* Information relating to the child's social background collected by the CA in the child's State of habitual residence pursuant to Article 7(d) may be submitted for consideration by the court in connection

with a judicial return proceeding. Under the last paragraph of Article 13, the court must consider home studies and other social background reports provided by the CA or other competent authorities in the child's State of habitual residence.

(c) *Determination of "wrongfulness".* If a court requests an applicant to obtain a determination from the authorities of the child's State of habitual residence that the removal or retention was wrongful, Central Authorities are to assist applicants, so far as practicable, to obtain such a determination. Article 15.

(d) *Costs.* Under Article 26, each CA bears its own costs in applying the Convention. The actual operating expenses under the Convention will vary from one Contracting State to the next depending upon the volume of incoming and outgoing requests and the number and nature of the procedures available under internal law to carry out specified Convention tasks.

Subject to limited exceptions noted in the next paragraph, the Central Authority and other public services are prohibited from imposing any charges in relation to applications submitted under the Convention. Neither the applicant nor the CA in the requesting State may be required to pay for the services rendered directly or indirectly by the CA of the requested State.

The exceptions relate to transportation and legal expenses to secure the child's return. With respect to transportation, the CA in the requested State is under no obligation to pay for the child's return. The applicant can therefore be required to pay the costs of transporting the child. With respect to legal expenses, if the requested State

enters a reservation in accordance with Articles 26 and 42, the applicant can be required to pay all costs and expenses of the legal proceedings, and those arising from the participation of legal counsel or advisers. However, see III. J 2 of this analysis discussing the possibility that the court ordering the child's return will levy these and other costs upon the abductor. Even if the reservation under Articles 26 and 42 is entered, under Article 22 no security, bond or deposit can be required to guarantee the payment of costs and expenses of the judicial or administrative proceedings falling within the Convention.

Under the last paragraph of Article 26 the CA may be able to recover some of its expenses from the person who engaged in the wrongful conduct. For instance, a court that orders a child returned may also order the person who removed or retained the child to pay the expenses incurred by or on behalf of the petitioner, including costs of court proceedings and legal fees of the petitioner. Likewise, a court that issues an order concerning visitation may direct the person who prevented the exercise of visitation rights to pay necessary expenses incurred by or on behalf of the petitioner. In such cases, the petitioner could recover his or her expenses, and the CA could recover its outlays on behalf of the petitioner, including costs associated with, or payments made for, locating the child and the legal representation of the petitioner.

V. Access Rights—Article 21

A. Remedies for Breach

Up to this point this analysis has focussed on judicial and administrative remedies for the removal or retention of children in breach of custody rights. "Access rights," which are synonymous with "visitation rights", are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enunciated in Article 21 and do not include the return remedy provided by Article 12.

B. Defined

Article 5(b) defines "access rights" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence."

A parent who takes a child from the country of its habitual residence to another country party to the Convention for a summer visit pursuant to either a tacit agreement between the parents or a court order is thus exercising his or her access rights. Should that parent fail to return the child at the end of the agreed upon visitation period, the retention would be wrongful and could give rise to a petition for return under Article 12. If, on the other hand, a custodial parent resists permitting the child to travel abroad to visit the non-custodial parent, perhaps out of fear that the child will not be returned at the end of the visit, this

interference with access rights does not constitute a wrongful retention within the meaning of Article 3 of the Convention. The parent whose access rights have been infringed is not entitled under the Convention to the child's "return," but may request the Central Authority to assist in securing the exercise of his or her access rights pursuant to Article 21.

Article 21 may also be invoked as a precautionary measure by a custodial parent who anticipates a problem in getting the child back at the end of a visit abroad. That parent may apply to the CA of the country where the child is to visit the non-custodial parent for steps to ensure the return of the child at the end of the visit—for example, through appropriate imposition of a performance bond or other security.

C. Procedure for Obtaining Relief

Procedurally Article 21 authorizes a person complaining of, or seeking to prevent, a breach of access rights to apply to the CA of a Contracting State in the same way as a person seeking return of the child. The application would contain the information described in Article 8, except that information provided under paragraph (c) would be the grounds upon which the claim is made for assistance in organizing or securing the effective exercise of rights of access.

Once the CA receives such application, it is to take all appropriate measures pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights is subject. This includes initiating or facilitating the institution of

proceedings, either directly or through intermediaries, to organize or protect access rights and to secure respect for conditions to which these rights are subject.

If legal proceedings are instituted in the Contracting State in which the noncustodial parent resides. Article 21 may not be used by the noncustodial parent to evade the jurisdiction of the courts of the child's habitual residence, which retain authority to define and/or condition the exercise of visitation rights. A parent who has a child abroad for a visit is not to be allowed to exploit the presence of the child as a means for securing from the CA (or court) in that country more liberal visitation rights than those set forth in a court order agreed upon in advance of the visit. Such result would be tantamount to sanctioning forum-shopping contrary to the intent of the Convention. Any such application should be denied and the parent directed back to the appropriate authorities in the State of the child's habitual residence for consideration of the desired modification. Pending any such modification, once the lawful visitation period has expired, the custodial parent would have the right to seek the child's return under Article 3.

The Perez-Vera Report gives some limited guidance as to how CA's are to cooperate to secure the exercise of access rights:

. . . it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to

return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority. Perez-Vera Report, paragraph 128 at page 466.

D. Alternative Remedies

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Articles 18, 29 and 34 an aggrieved parent whose access rights have been violated may bypass the CA and the Convention and apply directly to the judicial authorities of a Contracting State for relief under other applicable laws.

In at least one case it is foreseeable that a parent abroad will opt in favor of local U.S. law instead of the Convention. A noncustodial parent abroad whose visitation rights are being thwarted by the custodial parent resident in the United States could invoke the UCCJA to seek enforce-

ment of an existing foreign court order conferring visitation rights. Pursuant to section 23 of the UCCJA, a state court in the United States could order the custodial parent to comply with the prescribed visitation period by sending the child to the parent outside the United States. This remedy is potentially broader and more meaningful than the Convention remedy, since the latter does not include the right of return when a custodial parent obstructs the noncustodial parent's visitation rights, *i.e.*, by refusing to allow the other parent to exercise those rights. It is possible that a parent in the United States seeking to exercise access rights with regard to a child habitually resident abroad may similarly find greater relief under foreign law than under the Convention.

VI. Miscellaneous and Final Clauses

A. Article 36

Article 36 permits Contracting States to limit the restrictions to which a child's return may be subject under the Convention, *i.e.*, expand the return obligation or cases to which the Convention will apply. For instance, two or more countries may agree to extend coverage of the Convention to children beyond their sixteenth birthdays, thus expanding upon Article 4. Or, countries may agree to apply the Convention retroactively to wrongful removal and retention cases arising prior to its entry into force for those countries. Such agreement would remove any ambiguity concerning the scope of Article 35. The Department of State is not proposing that the United States make use of this Article.

B. Articles 37 and 38

Chapter VI of the Hague Convention consists of nine final clauses concerned with procedural aspects of the treaty, most of which are self-explanatory. Article 37 provides that states which were members of the Hague Conference on Private International Law at the time of the Fourteenth Session (October 1980) may sign and become parties to the Convention by ratification, acceptance or approval. Significantly, under Article 38 the Convention is open to accession by non-member States, but enters into force only between those States and member Contracting States which specifically accept their accession to the Convention. Article 38.

C. Articles 43 and 44

In Article 43 the Convention provides that it enters into force on the first day of the third calendar month after the third country has deposited its instrument of ratification, acceptance, approval or accession. For countries that become parties to the Convention subsequently, the Convention enters into force on the first day of the third calendar month following the deposit of the instrument of ratification. Pursuant to Article 43, the Convention entered into force on December 1, 1983 among France, Portugal and five provinces of Canada, and on January 1, 1984 for Switzerland. As of January, 1986 it is in force for all provinces and territories of Canada with the exception of Alberta, the Northwest Territories, Prince Edward Island and Sasketchewan.

The Convention enters into force in ratifying countries subject to such declarations or reserva-

tions pursuant to Articles 39, 40, 24 and 26 (third paragraph) as may be made by each ratifying country in accordance with Article 42.

The Convention remains in force for five years from the date it first entered into force (*i.e.*, December 1, 1983), and is renewed tacitly every five years absent denunciations notified in accordance with Article 44.

D. Articles 39 and 40

Article 39 authorizes a Contracting State to declare that the Convention extends to some or all of the territories for the conduct of whose international relations it is responsible.

Under Article 40, countries with two or more territorial units having different systems of law relative to custody and visitation rights may declare that the Convention extends to all or some of them. This federal state clause was included at the request of Canada to take account of Canada's special constitutional situation. The Department of State is not proposing that the United States make use of this provision. Thus, if the United States ratifies the Convention, it would come into force throughout the United States as the supreme law of the land in every state and other jurisdiction.

E. Article 41

Article 41 is another provision inserted at the request of one country, and is best understood by reciting the reporter's explanatory comments:

Finally a word should be said on Article 41, since it contains a wholly novel provision in Hague Conventions. It also appears in the other

Conventions adopted at the Fourteenth Session, *i.e.*, the *Convention on International Access to Justice*, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.

This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see P.-v. No. 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, Article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties. Perez-Vera Report, paragraph 149 at page 472.

F. Article 45

Article 45 vests the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depository for the Convention, with the responsibility to notify Hague Conference member States and other States party to the Convention of all actions material to the operation of the Convention.

Recommended Return Application Form

The following model form was recommended by the Fourteenth Session of the Hague Conference on Private International Law (1980) for use in making applications pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction for the return of wrongfully removed or retained children. The version of the form to be used for requesting the return of such children from the United States will probably seek additional information, in particular to help authorities in the United States in efforts to find a child whose whereabouts are not known to the applicant.

Request for Return

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Requesting Central Authority or Applicant

Requested Authority

Concerns the following child: who will attain the age of 16 on , 19 .

Note.—The following particulars should be completed insofar as possible.

I—Identity of the Child and its Parents

1 Child

Name and first names

Date and place of birth

Passport or identity card No., if any

Description and photo, if possible (see annexes)

2 Parents

2.1 Mother:

Name and first names

Date and place of birth

Nationality

Occupation

Habitual residence

Passport or identity card No., if any

2.2 Father:

Name and first names

Date and place of birth

Nationality

Occupation

Habitual residence

Passport or identity card No., if any

2.3 Date and place of marriage

II—Requesting Individual or Institution (who actually exercised custody before the removal or retention)

3 Name and first names

Nationality of individual applicant

Occupation of individual applicant

Address

Passport or identity card No., if any

Relation to the child

Name and address of legal adviser, if any

III—Place Where the Child Is Thought To Be

4.1 Information concerning the person alleged to have removed or retained the child

Name and first names

Date and place of birth, if known

Nationality, if known

Occupation

Last known address

Passport or identity card No., if any

Description and photo, if possible (see annexes)

4.2 Address of the child

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child

IV—Time, Place, Date and Circumstances of the Wrongful Removal or Retention

V—Factual or Legal Grounds Justifying the Request

VI—Civil Proceedings in Progress

VII—Child Is To Be Returned To:

a. Name and first names

Date and place of birth

Address

Telephone number

b. Proposed arrangements for return of the child

VIII—Other Remarks

IX—List of Documents Attached *

* E.g. Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

Date

Place

Signature and/or stamp of the requesting Central Authority or applicant

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Exhibit B

INTERNATIONAL CHILD ABDUCTION REMEDIES (ICARA)

Sec.

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Sec. 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act" meaning Pub. L. 100-300, Apr. 29, 1988, 102 Stat. 437, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

SHORT TITLE

Section 1 of Pub. L. 100-300 provided that: "This Act (enacting this chapter and amending section 663 of this title) may be cited as the 'International Child Abduction Remedies Act'."

Sec. 11602. Definitions

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application

with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government

designated by the President under section 11606(a) of this title.

Sec. 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as

used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States; the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Sec. 11604. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect

the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Sec. 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Sec. 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. 301 et seq.), obtain information from the Parent Locator Service.

Sec. 11607. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

Sec. 11608. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

Sec. 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

Sec. 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

Exhibit C

ELIZABETH II c.41

Children Act 1989

1989 CHAPTER 41

An Act to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children's homes, community homes, voluntary homes and voluntary organisations; to make provision with respect to fostering, child minding and day care for young children and adoption; and for connected purposes.

[16 November 1989]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INTRODUCTORY

Welfare of the child.

1.—(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

Parental responsibility for children.

2.—(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act.

(3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends their meaning).

(4) The rule of law that a father is the natural guardian of his legitimate child is abolished.

(5) More than one person may have parental responsibility for the same child at the same time.

(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(8) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.

(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it

which may arise from any failure to meet any part of his parental responsibility for the child concerned.

Meaning of "parental responsibility".

3.—(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who—

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

Acquisition of parental responsibility by father.

4.—(l) Where a child's father and mother were not married to each other at the time of his birth—

(a) the court may, on the application of the father, order that he shall have parental responsibility for the child; or

(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

(a) it is made in the form prescribed by regulations made by the Lord Chancellor; and

(b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

(3) Subject to section 12(4), an order under subsection (1)(a), or a parental responsibility agree-

ment, may only be brought to an end by in order of the court made on the application—

(a) or any person who has parental responsibility for the child; or

(b) with leave of the court, of the child himself.

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

Appointment of guardians.

5.—(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if —

(a) the child has no parent with parental responsibility for him; or

(b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force.

(2) The power conferred by subsection (1) may also be exercised in any family proceedings if the court considers that the order should be made even though no application has been made for it.

(3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.

(4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death.

(5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or—

(a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements section 9 of the Wills Act 1837; or

(b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.

(6) A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned.

(7) Where—

(a) on the death of any person making an appointment under subsection (3) or (4), the child concerned has no parent with parental responsibility for him; or

(b) immediately before the death of any person making such an appointment, a residence order in his favour was in force with respect to the child,

the appointment shall take effect on the death of that person.

(8) Where, on the death of any person making an appointment under subsection (3) or (4)—

(a) the child concerned has a parent with parental responsibility for him; and

Exhibit D

SECTION 1 OF THE CHILD ABDUCTION ACT 1984 ENGLAND AND WALES LAW

Section 1

(1) Subject to subsection (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

(2) A person is connected with a child for the purposes of this section if—

(a) he is a parent of the child; or

(b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child; or

(c) he is the guardian of the child; or

(d) he is a person in whose favour a residence order is in force with respect to the child; or

(e) he has custody of the child.

(3) In this section "the appropriate consent", in relation to a child means:

(a) the consent of each of the following:

(i) the child's mother;

(ii) the child's father, if he has parental responsibility for him;

(iii) any guardian of the child;

(iv) any person in whose favour a residence order is in force with respect to the child;

(v) Any person who has custody of the child; or

(b) the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989; or

(c) if any person has custody of the child, the leave of the court which awarded custody to him.

(4) A person does not commit an offence under this section by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if—

(a) he is a person in whose favour there is a residence order in force with respect to the child; and

(b) he takes or sends him out of the United Kingdom for a period of less than one month.

(4A) Subsection (4) above does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under Part II of the Children Act 1989.

(5) A person does not commit an offence under this section by doing anything without the

consent of another person whose consent is required under the foregoing provisions if—

(a) he does it in the belief that the other person

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

(c) the other person has unreasonably refused to consent.

(5A) Subsection (5)(c) above does not apply if—

(a) the person who refused to consent is a person—

(i) in whose favour there is a residence order in force with respect to the child; or

(ii) who has custody of the child; or

(b) the person taking or sending the child out of the United Kingdom is, by so acting, in breach of an order made by a court in the United Kingdom.

(6) Where, in proceedings for an offence under this section, there is sufficient evidence to raise an issue as to the application of subsection (5) above, it shall be for the prosecution to prove that the subsection does not apply.

(7) For the purposes of this section:

(a) 'guardian of a child', 'residence order' and 'parental responsibility' have the same meaning as in the Children Act 1989; and

(b) a person shall be treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child.

(8) This section shall have effect subject to the provisions of the Schedule to this Act in relation to a child who is in the care of a local authority detained in a place of safety, remanded to a local authority accommodation or the subject of proceedings or an order relating to adoption.

Punishable with up to seven years imprisonment.

Proceedings only with permission of the D.P.P.

SECTION 2 OF THE CHILD ABDUCTION ACT 1984 ENGLAND AND WALES LAW

Section 2

(1) Subject to subsection (3) below, a person, other than one mentioned in subsection (2) below, commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

(a) so as to remove him from the lawful control of any person having lawful control of the child; or

(b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

(2) The persons are—

(a) where the father and mother of the child in question were married to each other at the time of his birth, the child's father and mother;

(b) where the father and mother of the child in question were not married to each other at the time of his birth, the child's mother; and

(c) any other person mentioned in section 1 (2)(c) to (e) above.

(3) In proceedings against any person for an offence under this section, it shall be a defence for that person to prove—

(a) where the father and mother of the child in question were not married to each other at the time of his birth—

(i) that he is the child's father; or

(ii) that, at the time of the alleged offence, he believed, on reasonable grounds, that he was the child's father; or

(b) that, at the time of the alleged offence, he believed that the child had attained the age of sixteen.

Punishable with up to seven years imprisonment.

Proceedings DO NOT require the permission of the D.P.P.

SECTION 3 OF THE CHILD ABDUCTION ACT 1984 ENGLAND AND WALES LAW

Section 3

For the purposes of this Part of the Act—

(a) a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken;

(b) a person shall be regarded as sending a child if he causes the child to be sent;

(c) a person shall be regarded as detaining a child if he causes the child to be detained or induces the child to remain with him or any other person and

(d) references to a child's parents and to a child whose parents were (or were not) married to each other at the time of his birth shall be construed in accordance with section 1 of the Family Law Reform Act 1987 (which extends their meaning).

Exhibit E

CERTIFIED COPY OF AN ENTRY

BAH REDACTED

Pursuant to the Births and Deaths Registration Act 1953

BIRTH Entry No: 24

Registration district

REDACTED

Sub-district

Administrative area

City of **REDACTED**

CHILD

1. Date and place of birth
2. Name and surname
3. Sex

FATHER

4. Name and surname
   Manuel Jose LOZANO DE CASTRO
5. Place of birth
   REDACTED
6. Occupation
   Customer Services Clerk

MOTHER

7. Name and surname
   Diana Lucia MONTOYA ALVAREZ

8.(a) Place of birth
REDACTED

8.(b) Occupation
Accountant

9.(a) Maiden surname

9.(b) Surname at marriage if different from maiden surname

---

10. Usual address (if different from place of child's birth)
REDACTED

INFORMANT

11. Name and surname (if not the mother or father)

---

12. Qualification:
Father
Mother

13. Usual address
(if different from that in 10 above)
REDACTED

14. I certify that the particulars entered above are true to the best of my knowledge and belief:
MJ Dia
Signature of informant:

15. Date of registration

16. Signature of registrar:
A. Williams, Registrar

17. Name given after registration and surname

_____

Certified to be a true copy of the entry in a register in my custody.

_____

Superintendent Registrar

Registrar

Date: _____

CAUTION: THERE ARE OFFENCES RELATING TO FALSIFYING OR ALTERING A CERTIFICATE AND USING OR POSSESSING A FALSE CERTIFICATE © CROWN COPYRIGHT

WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY.

Exhibit F

[LOGO]
Official Solicitor
International Child Abduction & Contract Unit (ICACU)

81 Chancery Lane
London
WC2A-10D

DX Q012 London Chancery Lane

Tel: 020 7911 7243
Fax: 020 7911 7248
E-Mail: clair.joslin@offsol.gsi.gov.uk
Web: www.officialsolicitor.gov.uk
Our Ref: IOAOU/CLJ/L000807.1

Ebbony Jackson
Office of Children's Issues (CA/OCS/CI)
U.S. Department of State, SA-29
2100 Pennsylvania Ave., NW, 4th Floor
Washington, DC 20037

Your Ref:

23 March 2010

For the Urgent attention of the Central Authority for International child abduction

Dear Ebbony:

Hague Convention on the Civil Aspects of International Child Abduction-Request for the return of [redacted].

I attach a new application under Article 12 of the 1980 Hague Convention on behalf of Mr Manuel Jose Lozano, father, for the return of his [redacted] **REDACTED** from the United States of

America. Mr Lozano alleges that his [redacted] was wrongfully removed to the United States of America by [redacted] mother, Ms Diana Lucia Montoya Alvarez.

The parents were not married to each other, however, The Children Act 1989 says that a father shall have parental responsibility for their child if he has acquired it in accordance with the provisions of the act. If both parents are present when the birth of their child is registered under the Births and Deaths Registration Act 1953 (sections 4(1)(a) and 4(1A)(a) of the Children Act 1989 - as amended by the Adoption and Children Act 2002). Mr. Lozano is named on his [redacted] birth certificate and so has parental responsibility for **REDACTED**.

Section 3(1) of the Children Act 1989 defines parental responsibility as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

Although the scope of parental responsibility is not defined by the Children Act 1989 and has not been defined judicially, aspects of parental responsibility which have been acknowledged by the courts include consenting (or not) to the child's removal from the jurisdiction.

The removal of the child from, or the retention of the child away from the jurisdiction of England and Wales by a parent who holds parental responsibility without the consent of the other parent who also holds parental responsibility is wrongful as defined by Article 3 of the Convention because it breaches the left behind parent's rights of custody as defined by Article 5, that is, the

parental responsibility which that parent enjoys and which enables him or her to care for, or make arrangements for the care of, the child and, in particular, to determine the child's residence.

Furthermore the Child Abduction Act 1984 makes it an offence for any person connected with a child under the age of 16, to take or send the child out of the United Kingdom without the consent of any other person who has parental responsibility for the child. The term connected with a child is defined in the Child Abduction Act 1984 and includes the parents or guardians of a child and anyone who has parental responsibility for the child.

ENCLOSED DOCUMENTS:

Cover letter from Mr Lozano's English solicitor
ICACU application form
Mr Lozano's signed authorisation
Certified copy of [redacted] birth certificate
Photos of mother and [redacted]
Request for legal assistance in the USA
Authorization to release case information
Copy of correspondence and application submitted to the English Court
Child Abduction Act 1984
Children's Act 1969

Full details of the application are set out in the attached documents. I would be grateful if you would acknowledge receipt of this application at your earliest convenience.

Yours sincerely
/s/ Clair Louise Joslin
Clair Louise Joslin
International Child Abduction
and Contact Unit
For the Official Solicitor

Encs

[LOGO]
Official Solicitor
International Child Abduction & Contract Unit (ICACU)

CENTRAL AUTHORITY FOR ENGLAND AND WALES APPLICATION FORM

Please read the ICACU Guide to making an application before completing this form.

Section 1: Please indicate by putting a cross in the appropriate box as to what type of application you wish to make.

Request for Return X

Request for Contact

Request for Registration and Enforcement of an existing court order

Section 2: Details of child(ren).

Child 1

Surname:
REDACTED

First Name:
REDACTED

Date of Birth
REDACTED Male Female

Country of habitual residence (immediately before removal):
REDACTED

Passport No.:
REDACTED

Nationality:
BRITISH

Child 2

Surname:

First Name:

Date of Birth Male Female

Country of habitual residence (immediately before removal):

Passport No.:

Nationality:

Details of child(ren) continued. (this page can be removed if not used).

Child 3

Surname:

First Name:

Date of Birth Male Female

Country of habitual residence (immediately before removal):

Passport No.:

Nationality:

Child 4

Surname:

First Name:

Date of Birth Male Female

Country of habitual residence (immediately before removal):

Passport No.:

Nationality:

Child 5

Surname:

First Name:

Date of Birth Male Female

Country of habitual residence (immediately before removal):

Passport No.:

Nationality:

Section 3. Details of parents.

Mother

Surname:
MONTOYA ALVAREZ

First Name:
DIANA LUCIA

Date of Birth
REDACTED

Country of habitual residence:
ENGLAND, UK BEFORE REMOVAL OF CHILD

LOCATION NOW UNKNOWN BUT SUSPECTED TO BE IN MANHATTAN, NEW YORK, USA

Passport No.:
REDACTED

Nationality:
BRITISH

Occupation:
UNKNOWN (WAS UNEMPLOYED)

Father

Surname:
LOZANO

First Name:
MANUEL JOSE

Date of Birth
REDACTED

Country of habitual residence:
ENGLAND, UNITED KINGDOM

Passport No.:
REDACTED

Nationality:
COLOMBIAN (INDEFINITE LEAVE TO REMAIN IN UK)

Occupation:

Date and place of marriage (if applicable)

Date and place of divorce (if applicable)

Section 4: Details of requesting individual or institution.

Surname:
LOZANO

First Name:
MANUEL LOZANO

Relationship to child(ren):
FATHER

Contact Address:
REDACTED

Postcode:
REDACTED

Telephone No.:
REDACTED

Mobile Telephone No.:
REDACTED

email: **REDACTED**

Details of your legal adviser (if any). Please note you should only provide details of a solicitor if you are actually instructing one in relation to this matter.

Name of solicitor:
FIONNGHUALA DEVEREAUX

Contact Address:
VIKING HOUSE
17-19 PETERBOROUGH ROAD
HARROW ON THE HILL
MIDDLESEX
HA1 2AX
DX 4216 HARROW

Telephone No.: **020 8515 9161**

Fax No.: **020 7923 3320**

email:
FIonnghualaD@duncanlewis.com

Please indicate by putting a cross in one of the boxes below whether you wish the ICACU to correspond directly with you or your solicitor. You should be aware that there could be cost implications for you if we correspond with your solicitor.

Please only correspond with me regarding my case.

Please correspond with my solicitor regarding my case **X**

Section 5: Details of person alleged to have removed/retained/preventing contact with child(ren) and current location of child(ren).

Surname:
MONTOYA ALVAREZ

First Name:
DIANA LUCIA

Relationship to child(ren):
MOTHER

Details of location of child(ren)

Please provide as much information as possible

FURTHER TO SEVERAL DISCLOSURE ORDERS BEING SERVED ON THE MOTHER'S SISTER IN THE UK, THE CHILD BENEFIT OFFICE (TWICE), PREVIOUS GP, PREVIOUS SOLICITORS, THE METROPOLITAN POLICE, CONFIDENTIAL WOMANS REFUGE WHERE THE MOTHER WAS RESIDING UNTIL JULY 2009, NOT POSITIVE INFORMATION HAS BEEN OBTAINED IN RELATION TO THE WHEREABOUTS OF MOTHER AND CHILD.

NONE OF THE PARTIES SERVED WITH THE DISCLOSURE ORDERS HAVE DETAILS OF THE MOTHER AND CHILD'S WHEREABOUTS.

THE MOTHER IS SUSPECTED TO HAVE WRONGFULLY REMOVED THE CHILD FROM THE UK TO MANHATTAN, NEW YORK, USA, WITHOUT THE FATHER'S PERMISSION. THE FATHER HAS RIGHTS OF CUSTODY AND VETO BY VIRTUE OF HAVING PARENTAL RESPONSIBILITY.

THE MOTHER IS SUSPECTED TO BE STAYING WITH HER SIBLING, [redacted] IN MANHATTAN, NEW YORK, USA, THE FATHER DOES NOT HAVE [redacted] ADDRESS DETAILS, BUT DOES HAVE TWO CONTACT TELEPHONE NUMBERS FOR HER.

HOME:

REDACTED

MOBILE:

THE FATHER IS PARTICULARLY CONCERNED ABOUT THE CHILD RESIDING WITH [redacted] AS SHE HAS A RECORD OF DRUG ABUSE (COCAINE). [redacted]'S DAUGHTER ALSO LIVES WITH [redacted] AS DOES HER BOYFRIEND. BOTH [redacted]'S DAUGHTER AND HER BOYFRIEND ARE KNOWN DRUG ADDICTS, AND THERE HAS BEEN SUBSTANTIAL POLICE INVOLVEMENT IN THE PAST RESULTING IN THE PARTIES ARREST AND DETAINMENT. THE FATHER KNOWS THIS AS THE MOTHER HAD TOLD HIM PREVIOUSLY. THE MOTHER ONCE TOLD THE FATHER THAT BOTH THE POLICE AND SOCIAL SERVICES HAD THREATENED TO REMOVE [redacted]'S CHILDREN FROM HER DUE TO HER DRUG ABUSE. THE FATHER IS CONCERNED THAT HIS CHILD MAY COME TO HARM BEING IN SUCH AN ENVIRONMENT.

THE FATHER ALSO BELIEVES THAT THE MOTHER HAS MENTAL HEALTH PROBLEMS INCLUDING DEPRESSION AND THAT THE CHILD MAY BE AT RISK. THEREFORE THE CHILD NEEDS TO BE LOCATED AS SOON AS POSSIBLE.

Details of other persons who might be able to supply additional information relating to the location of the child(ren):

THE MOTHER ALSO HAS SIBLINGS IN LONDON, UK.

THE MOTHER'S SISTER, [redacted] HAS BEEN SERVED WITH A SECTION 33 ORDER FOR DISCLOSURE OF THE CHILD'S WHERE-ABOUTS. [redacted] REVERTED TO THE COURT STATING THAT SHE DID NOT KNOW WHERE HER SISTER WAS. THE FATHER DOES NOT BELIEVE THAT [redacted] DOES NOT KNOW WHERE THE MOTHER IS. WHILST THE FATHER AND MOTHER WERE IN A RELATIONSHIP, THE MOTHER WOULD TALK TO HER SISTER, [redacted], TWO OR THREE TIMES A DAY BY TELEPHONE. THE MOTHER WOULD ALSO VISIT [redacted] ONCE OR TWICE A WEEK. THE MOTHER AND [redacted] WERE EXTREMELY CLOSE AND HAVE CHILDREN OF SIMILAR AGES THAT OFTEN PLAYED TOGETHER. THEREFORE THE FATHER IS OF THE VIEW THAT THERE IS SIMPLY NO WAY THAT [redacted] DOES NOT KNOW WHERE THE MOTHER AND CHILD ARE. THE FATHER BELIEVES THAT [redacted] HAS A DISHONEST NATURE AS SHE IS CLAIMING THE BENEFITS OF A SINGLE MOTHER DESPITE BEING MARRIED AND LIVING WITH HER HUSBAND. [redacted] ADDRESS IS:

Redacted

HER HOME TELEPHONE NUMBER IS:

HER MOBILE NUMBER IS [redacted]. [redacted] WILL KNOW THE WHEREABOUTS OF MOTHER AND CHILD. HOWEVER IT SHOULD BE CONSIDERED WHETHER IF SHE IS CONTACTED SHE MAY ALERT THE MOTHER TO THE FACT THAT THE FATHER IS LOOKING FOR THE CHILD AND THE MOTHER MAY CHANGE HER LOCATION AGAIN.

THE MOTHER ALSO HAS ANOTHER SIBLING IN LONDON, [redacted]. ALTHOUGH THE FATHER DOES NOT HAVE HER EXACT ADDRESS HE KNOWS THAT SHE LIVES NEAR [redacted] IN LONDON. HER TELEPHONE NUMBERS ARE AS FOLLOWS:

HOME: [redacted]

MOBILE 1: [redacted]

MOBILE 2: [redacted]

Section 6: Request for Return. You should only complete this section if you are making an application for return of your child(ren).

6(a): Date and circumstances of wrongful removal or retention

Please provide brief details of events leading up to removal or retention of child(ren).

THE MOTHER WENT TO NEW YORK, USA, ON AROUND 9TH NOVEMBER 2008. THE MOTHER LEFT THE CHILD WITH THE FATHER AND PATERNAL GRANDMOTHER [redacted] IN THE UK, WHILST SHE WAS AWAY. THE MOTHER WAS STAYING WITH HER SISTER [redacted] IN MANHATTAN, NEW YORK. HER TELEPHONE DETAILS ARE GIVEN IN THIS FORM.

THE MOTHER RETURNED FROM THE USA ON OR AROUND 17TH NOVEMBER 2008. ON HER THE RETURN, THE MOTHER TOLD THE FATHER THAT HE MUST LEAVE THE FAMILY HOME. ON OR AROUND 19TH NOVEMBER 2008 THE MOTHER LEFT THE FAMILY HOME WITH THE CHILD WITH ONLY THE CLOTHES THEY HAD ON THEM. THE FATHER BELIEVED THAT SHE WAS GOING TO STAY WITH HER SISTER ([redacted]) FOR A FEW DAYS, AS SHE HAD DONE THIS BEFORE WHEN THE PARTIES HAD FALLEN OUT. THE MOTHER MAY ALSO HAVE BEEN STAYING WITH HER OTHER SISTER IN KILBURN, [redacted] IN KILBURN, LONDON.

ON OR AROUND 22ND NOVEMBER 2008 THE FATHER ATTEMPTED TO CONTACT THE MOTHER BY TELEPHONE TO FIND OUT WHERE SHE AND THE CHILD WERE. THE MOTHER TOLD THE FATHER THAT SHE HAD REPORTED HIM TO THE POLICE AND THEN THE MOTHER HUNG UP THE PHONE. THE FATHER WENT TO SOUTH HARROW POLICE STATION TO SEE WHAT THE MOTHER WAS REFERRING TO AND THEY STATED THAT THEY DID NOT HAVE ANY RECORD OF ANY COMPLAINTS. THE FATHER GAVE THE POLICE HIS CONTACT DETAILS IN CASE THEY NEEDED TO CONTACT HIM IN THE FUTURE.

ON 14TH DECEMBER 2008 THE FATHER RECEIVED A CALL FROM [redacted]. [redacted] STATED THAT THE FATHER SHOULD NOT MAKE ANY ATTEMPT TO CONTACT MOTHER OR CHILD OR HE WOULD BE SORRY. [redacted]

STATED SHE WANTED TO COLLECT THE MOTHER'S BELONGINGS FROM THE FORMER FAMILY HOME. THE FATHER STATED THAT HE WOULD NOT ALLOW ANYONE OTHER THAN THE MOTHER TO REMOVE ANYTHING FROM THE FAMILY HOME. AFTER TEN MINUTES THE FATHER THEN RECEIVED A CALL FROM [redacted] WHO STATED THAT MOTHER AND CHILD WERE SAFE AND THAT THEY WERE BEING PROTECTED BY THE POLICE IN A REFUGE.

ON 27TH MARCH 2009 THE FATHER'S SOLICITORS (WE) RECEIVED A LETTER FROM SOLICITORS INSTRUCTED BY THE MOTHER. THE MOTHER WOULD NOT ALLOW THE FATHER TO HAVE ANY CONTACT WITH THE CHILD DUE TO THE FATHER'S ALLEGED AGGRESSIVE AND THREATENING BEHAVIOR IN THE PAST. THE FATHER DENIES THESE ALLEGATIONS. THE POLICE CONFIRMED THAT THE MOTHER WAS BEING HOUSED IN A WOMENS REFUGE FOR THE TIME BEING.

MS. [redacted] WROTE TO THE FATHER'S SOLICITORS TO TELL THEM THAT SHE DID NOT KNOW WHERE THE MOTHER AND CHILD WERE BUT THAT SHE HAD SPOKEN TO THE MOTHER ON THE TELEPHONE. THE FATHER BELIEVES THAT [redacted] DOES KNOW THE WHEREABOUTS OF MOTHER AND CHILD AND THAT THEY ARE IN REGULAR CONTACT.

ON 16TH SEPTEMBER 2009 THE FATHER MADE AN APPLICATION TO THE PRFD FOR A SECTION 33 FAMILY LAW ACT 1986 DISCLOSURE ORDER TO BE SERVED ON

[redacted], THE METROPOLITAN POLICE, THE CHILD BENEFIT OFFICE, THE MOTHER'S SOLICITORS, THE CHILDS GP, THE WOMENS REFUGE. ALL SERVED WITH THE ORDER WERE UNABLE TO PROVIDE ANY DETAILS OF THE MOTHER AND CHILD'S WHEREABOUTS. THE FATHER THEREFORE BELIEVES MOTHER AND CHILD ARE NOW RESIDING WITH [redacted] IN MANHATTAN, NEW YORK, USA.

6(b): Factual or legal grounds justifying the request for return of child(ren).

Please provide evidence of your rights of custody with respect to child(ren):

THE FATHER IS NAMED ON THE CHILD'S BIRTH CERTIFICATE AND THEREFORE HAS PARENTAL RESPONSIBILITY FOR THE CHILD. THE MOTHER HAS REMOVED THE CHILD FROM THE UK WITHOUT THE FATHER'S PERMISSION.

AS THE FATHER HAS PARENTAL RESPONSIBILITY FOR THE CHILD HE HAS THE RIGHT TO DETERMINE THE CHILD'S PLACE OF RESIDENCE. THEREFORE AS THE CHILD HAS BEEN TAKEN BY THE MOTHER OUT OF THE JURISDICTION (UK) TO ANOTHER HAGUE CONVENTION COUNTRY (USA) WITHOUT THE CONSENT OF THE FATHER, THE REMOVAL OF THE CHILD IS IN BREACH OF THE RIGHTS OF CUSTODY OF THAT PARENT AND THE REMOVAL IS CONSIDERED WRONGFUL WITHIN THE MEANING OF THE HAGUE CONVENTION.

THE CHILD'S BIRTH CERTIFICATE IS ATTACHED IN EVIDENCE OF THE FACT THAT THE FATHER HAS PARENTAL RESPONSIBILITY FOR THE CHILD.

6(c): Arrangements for the return of children:

If applying for return please indicate whether you are prepared to travel to the country to which the child(ren) have been taken, both to attend the court hearing if necessary, and to collect the child(ren), should the application be successful or indicate any other person who could do so on your behalf.

THE CHILD NEEDS TO BE RETURNED TO THE UK WHERE COURT PROCEEDINGS ARE ONGOING IN RELATION TO ABDUCTION AND CONTACT. THE FATHER IS NOT WORKING AND THEREFORE COULD NOT AFFORD TO TRAVEL TO THE USA.

Section 7: Request for Contact. You should only complete this section if you are making an application for contact with your child(ren).

7(a): Circumstances relating to the prevention of contact with child(ren):

Please provide brief details relating to the prevention of your rights of contact

7(b): Proposed arrangements for contact.

Please provide your proposal for the contact you would like to have with your child(ren)

Section 8: Civil court proceedings that have concluded or are in progress:

In England and Wales (please provide copies of any court orders which have been made)

THERE ARE COURT PROCEEDINGS ONGOING IN ENGLAND, UK IN THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION UNDER CASE NUMBER FD09P01743.

AN APPLICATION UNDER SECTION 33 FAMILY LAW ACT 1986 FOR AN ORDER OF DISCLOSURE OF THE CHILD'S WHEREABOUTS HAS BEEN MADE AND SERVED ON VARIOUS PARTIES. THESE ORDERS ARE ATTACHED WITH ALL RELEVANT CORRESPONDENCE.

THE DISCLOSURE ORDERS WERE NOT SUCCESSFUL IN DETERMINING THE WHEREABOUTS OF THE CHILD. THE LAST KNOWN WHEREABOUTS OF THE MOTHER AND CHILD WAS IN JULY 2009 WHEN THE MOTHER AND CHILD WERE RESIDING IN A WOMENS REFUGE IN THE UK. THIS HAS BEEN CONFIRMED BY THE METROPOLITAN POLICE.

Outside England and Wales

Section 9: List of documents attached

You should include copies of any relevant court orders, statements or affidavits, and recent colour photographs of the plaintiff parent and the child(ren). Please also include copies of the child(ren)'s birth certificate and your marriage certificate (full A4 size copies which include details of both parents) or divorce decree.

Birth Certificate of [redacted];
Photocopy of [redacted];
Photocopy of [redacted] passport;
Copies of the Father's Court Applications;
Section 33 Family Law Act 1986 Disclosure Orders;
Relevant copy correspondence;
The most recent photographs of Mother and Child in the Father's possession.

Section 10: Applicant's authorisation

I authorise the requested Central Authority and it's agents to act on my behalf and to do all things reasonable and necessary in connection with this application.

Signature
/s/ Manuel Jose Lozano

Full name of Applicant (block capitals)
MANUEL JOSE LOZANO

Date: 15/03/10

PLEASE TAKE NOTICE:

AS AN UNDER-AGE MINOR, ALL PHOTOS OF THE CHILD IN QUESTION HAVE BEEN REDACTED AND OR REMOVED FROM THE PUBLIC VERSION OF THE ATTACHED PETITION

Children Act 1989

2. Parental responsibility for children

(1) Where a child's father and mother were a married to each other at the time of his birth, they shall each have parental responsibility for the child.

(1A) Where a child—

(a) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008; or

(b) has a parent by virtue of section 43 of that Act and is a person to whom section 1(3) of the Family Law Reform Act 1987 applies.

the child's mother and the other parent shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.

(2A) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies—

(a) the mother shall have parental responsibility for the child;

(b) the other parent shall have parental responsibility for the child if she has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.

(3) References into this Act to a child whose father and mother were or (as the case may be) were not married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends their meaning).

(4) The rule of law that a father is the natural guardian of his legitimate child is abolished.

(5) More than one person may have parental responsibility for the same child at the same time.

(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(8) The fact that a person has parental responsibility for a child shall not entitle him to act in any

way which would be incompatible with any order made with respect to the child under this Act.

(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not offset any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned.

3. Meaning of "parental responsibility"

(1) In this Act parental responsibility includes all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who—

(a) does not have parental responsibility for a particular child, but;

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

4. Acquisition of parental responsibility by father

(1) Where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);

(b) he and the child's mother make an agreement (a "parental responsibility agree-

ment") providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) The enactments referred to in subsection (1)(i) are—

(a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;

(b) paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(1B) The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

(a) it is made in the form prescribed by regulations made by the Lord Chancellor; and

(b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is in the prescribed manner.

(2A) A person who has required parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(3) The court may make an order under subsection (2A) on the application—

(a) of any person who has parental responsibility for the child; or

(b) with leave of the court, of the child himself, subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4);

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

4ZA: Acquisition of parental responsibility by second female parent

(1) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies, that parent shall require parental responsibility for the child if—

(a) she becomes registered as a parent of the child and under any of the enactments specified in subsection (2);

(b) she and the child's mother make an agreement providing for her to have parental responsibility for the child; or

(c) the courts, on her application, orders that she shall have parental responsibility for the child.

(2) The enactments referred to in subsection (1)(a) are

(a) paragraphs (a), (b) and (c) of section 10(1B) and of section 10A(1B) of the Births and Deaths Registration Act of 1953;

(b) paragraphs (a), (b) and (d) of section 18B(1) and sections 18B(3)(a) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14ZA(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(3) The Secretary of State may by order amend subsection (2) so as to add further enactments to the list in that subsection.

(4) An agreement under subsection (1)(b) is also a "parental responsibility agreement", and section 4(2) applies in relation to such an agreement as it applies in relation to parental responsibility agreements under section 4.

(5) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(6) The court may make an order under subsection (5) on the application—

(a) of any person who has parental responsibility for the child; or

(b) with the leave of the court, of the child himself,

subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).

(7) The court may only grant leave under subsection (6)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

4A Acquisition of parental responsibility by step-parent

(1) Where a child's parent ("parent A"), who has parental responsibility for the child is married to, or a civil partner of, a person who is not the child's parent ("the step-parent")—

(a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or

(b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child,

(2) An agreement under subsection (1)(a) is also a "parental responsibility agreement", and, section 4(2) applies in relation to such agreements as it applies in relation to parental responsibility agreements under section 4.

(3) A parental responsibility agreement under subsection (1)(a), or an order under subsection

(1)(b), may only be brought to an end by an order of the court made on the application—

(a) of any person who has parental responsibility for the child; or

(b) with the leave of the court, of the child himself.

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

5 Appointment of guardians

(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian or special guardian if—

(a) the child has no parent with parental responsibility for him; or

(b) a residence order has been made with respect to the child in favour of a parent, guardian or special guardian of his who has died while the order was in force; or

(c) paragraph (b) does not apply, and the child's only or last surviving special guardian dies.

(2) The power conferred by subsection (1) may also be exercised in any family proceedings if the court considers that the order should be made even though no application has been made for it.

(3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.

(4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death, and a special guardian of a child may appoint another individual to be the child's guardian in the event of his death.

(5) An appointment order subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or—

(a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or

(b) in any other case is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.

(6) A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned.

(7) Where—

(a) on the death of any person making an appointment under subsection (3) or (4), the child concerned has no parent with parental responsibility for him; or

(b) immediately before the death of any person making such an appointment, a resi-

dence order in his favour was in force with respect to the child or he was the child's only (or last surviving) special guardian,

the appointment shall take effect on the death of that person.

(8) Where on the death of any person making an appointment under subsection (3) or (4)—

(a) the child concerned has a parent with parental responsibility for him; and

(b) subsection (7)(b) does not apply,

the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

(9) Subsections (1) and (7) do not apply if the residence order referred to in paragraph (b) of those subsections was also made in favour of a surviving parent of the child.

(10) Nothing in this section shall be taken to prevent an appointment under subsection (3) or (4) being made by two or more persons acting jointly.

(11) Subject to any provision made by rules of court, no court shall exercise the High Court's inherent jurisdiction to appoint a guardian of the estate of any child.

(12) Where the rules of court are made under subsection (1) they may prescribe the circumstances in which, and conditions subject to which, an appointment of such a guardian may be made.

(13) A guardian of a child may only be appointed in accordance with the provisions of this section.

6. Guardians revocation and disclaimer

(1) Any appointment under section 5(3) or (4) revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.

(2) An appointment under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument, which is signed—

(a) by him; or

(b) at his direction, in the presence and in the presence of two witnesses who each attest the signature.

(3) An appointment under section 5(3) or (4) (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—

(a) destroys the instrument by which it was made; or

(b) has some other person destroy the instrument in his presence.

(3A) An appointment under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if the person appointed is the

spouse of the person who made the appointment and either—

(a) a decree of a court of civil jurisdiction in England and Wales dissolves or annuls the marriage; or

(b) the marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Part II the Family Law Act of 1986,

unless a contrary intention appears by the appointment.

(3B) An appointment under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if the person appointed is the civil partner of the person who made the appointment and either—

(a) an order of a court of civil jurisdiction in England and Wales dissolves or annuls the civil partnership; or

(b) the Civil Partnership is dissolved or annulled and the dissolution or annulment is entitled to recognition in England and Wales by virtue of Chapter 3 of Part 5 of the civil partnership Act 2004,

unless a contrary intention appears by the appointment.

(4) For the avoidance of doubt, an appointment under section 5(3) or (4) made in a will or codicil is revoked if the will or codicil is revoked.

(5) A person who is appointed as a guardian under section 5(3) or (4) may disclaim his appointment by an instrument in writing signed by him and made within a reasonable time of his first knowing that the appointment has taken effect.

(6) Where regulations are made by the Lord Chancellor prescribing the manner in which such disclaimers must be recorded, no such disclaimer shall have effect unless it is recorded in the prescribed manner.

(7) Any appointment of a guardian under section 5 may be brought to an end at any time by order of the court—

(a) on the application of any person who has parental responsibility for the child;

(b) on the application of the child concerned, with leave of the court; or

(c) n any family proceedings, if the court considers that it should be brought to an end even though no application has been made.

7. Welfare reports

(1) A court considering any question with respect to a child under this Act may—

(a) ask an officer of the Service or a Welsh family proceedings officer; or

(b) ask a local authority to arrange for

(i) an officer of the authority; or

(ii) such other person (other than an officer of the Service or a Welsh family

proceedings officer) as the authority considers appropriate,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.

(2) The Lord Chancellor may, after consulting the Lord Chief Justice, make regulations specifying matters which, unless the court orders otherwise, must be dealt with in any report under this section.

(3) The report may be made in writing, or orally, as the court requires.

(4) Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of—

(a) any statement contained in the report; and

(b) any evidence given in respect of the matters referred to in the report,

in so far as the statement or evidence is in the opinion of the court, relevant to the question which it is considering.

(5) It shall be the duty of the authority or officer of the Service or a Welsh family proceedings officer to comply with any request for a report under this section.

(6) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (2).

Child Abduction Act 1984 (c. 37)

Main body

PART I OFFENCES UNDER LAW OF ENGLAND AND WALES

Version 2 of 2 (Prospective available)

1. Office of abduction of child by parent, etc.

—(1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

[F1(2) a person is connected with a child for the purposes of this section if—

(a) he is a parent of the child; or

(b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child; or

(c) he is a guardian of the child; or

(d) he is a person in whose favour a residence order is in force with respect to the child; or

(e) he has custody of the child;

(3) In this section 'the appropriate consent', in relation to a child, means—

(a) the consent of each of the following—

(i) the child's mother;

(ii) the child's father, if he has parental responsibility for him;

(iii) any guardian of the child;

(iv) any person in whose favour a residence order is in force with respect to the child:

(v) any person who has custody of the child; or

(b) the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989; or

(c) if any person has custody of the child, the leave of the court which grants custody to him.

(4) A person does not commit an offence under this section by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if—

(a) he is a person in whose favour there is a residence order in force with respect to the child; and

(b) he takes or sends him out of the United Kingdom for a period of less than one month.

(4A) Subsection (4) above does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under Part II of the Children Act 1989.]

(5) A person does not commit an offence under this section by doing anything without the consent of another person whose consent is required under the foregoing provisions if—

(a) he does it in the belief that the other person—

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

(c) the other person has unreasonably refused to consent.

[F²(5A) Subsection (5)(a) above does not apply if—

(a) the person who refused to consent is a person—

(i) in whose favour there is a residence order in force with respect to the child; or

(ii) who has custody of the child; or

(b) the person taking or sending the child out of the United Kingdom is, by so acting in breach of an order made by a court by the United Kingdom.]

(6) Where, in proceedings for the offence under this section, there is sufficient evidence to raise an issue as to the application of subsection (5) above, it shall be for the prosecution to prove that that subsection does not apply.

[F³(7) for the purposes of subsection—

(a) "guardian of a child", "residence order" and "parental responsibility" have the same meaning as in the Children Act 1989; and

(b) a person shall be treated as having custody of the child if there is in force an order of a court in the United Kingdom awarding (whether solely or jointly with another person custody, legal custody or care and control of the child.)

(8) This section shall have effect subject to the provisions of the Schedule to this Act in relation to a child who is in the care of a local authority [detained in a place of safety, remanded to a local authority accommodation or the subject of] proceedings or an order relating to adoption.

CERTIFIED COPY OF AN ENTRY

BAH REDACTED

Pursuant to the Births and Deaths Registration Act 1953

BIRTH Entry No: [redacted]

Registration district
REDACTED

Administrative area
REDACTED

Sub-district

CHILD

1. Date and place of birth
   REDACTED
2. Name and surname
   REDACTED
3. Sex

FATHER

4. Name and surname
   Manuel Jose LOZANO DE CASTRO
5. Place of birth
   Colombia
6. Occupation
   Customer Services Clerk

MOTHER

7. Name and surname
   Diana Lucia MONTOYA ALVAREZ

8.(a) Place of birth
Colombia

8.(b) Occupation
Accountant

9.(a) Maiden surname

9.(b) Surname at marriage if different from maiden surname

---

10. Current address (if different from place of child's birth)
REDACTED

INFORMANT

11. Name and surname (if not the mother or father)

---

12. Qualification:
Father
Mother

13. Usual address
(if different from that in 10 above)
REDACTED

14. I certify that the particulars entered above are true to the best of my knowledge and belief:
MJ Dia
Signature of informant:

15. Date of registration
[redacted]

16. Signature of registrar:
A. Williams, Registrar

17. Name given after registration, and surname

_____

Certified to be a true copy of the entry in a register in my custody.

/s/ _____

Superintendent Registrar

Registrar

Date: _____

CAUTION: THERE ARE OFFENCES RELATING TO FALSIFYING OR ALTERING A CERTIFICATE AND USING OR POSSESSING A FALSE CERTIFICATE © CROWN COPYRIGHT

WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY.

[NEXT TWO PAGES REDACTED]

C100
Application under the Children Act 1989 for a residence, contact or other section 8 order

To be completed by the court_____

Name of court _____

Date issued _____

Case number_____

Child(ren)s name(s) _____

Child(ren)'s number(s)_____

Before completing this application please read the booklet **CB1—Making an application—Children and the Family Courts**. You can get a copy of all the forms and leaflets from your local court or they can be found at www.hmcourts-service.gov.uk

Cafcass/CAFCASS CYMRU will carry out checks as it considers necessary.

Cafcass—Children and Family Court Advisory and Support Service (in England); CAFCASS CYMRU—Children and Family Court Advisory and Support Service Wales.

Summary of application

Some people need permission to apply. See Section C of the booklet CB1.

Have you applied to the court for permission to make this application ☐ Yes ☒ Permission not required

Your name (the applicant(s))

MANUEL JOSE LOZANO

The respondents name(s) See Sections G and H of the booklet CB1

DIANA MONTOYA ALVERAS

Please list the name(s) of the children and the type(s) of order you are applying for starting with the oldest. To understand which order to apply for read the booklet CB1 Section D.

Name of children: **REDACTED**

Date of birth: **REDACTED**

Order(s) applied for: **REDACTED**

CONTACT ORDER AND PROHIBITED STEPS ORDER

2. About you (the applicant(s))

Your first name MANUEL

Middle name(s) JOSE

Surname LOZANO

Previous surnames (if any)

Date of birth **Redacted** Sex ☒ Male ☐ Female

Place of birth (town/county/country) COLOMBIA

If you do not wish your address to be made known to the respondent, leave the address details blank and complete Confidential Address Form C8

Address **Redacted**

Postcode

Home telephone number **Redacted**

Mobile telephone number **Redacted**

Have you lived at this address for more than 5 years? ☐ Yes ☒ No

If No, please provide details of all previous addresses you have lived at for the last 5 years.

Redacted

Your solicitor's details _____

Do you have a solicitor acting for you?

☒ Yes ☐ No

If Yes, please give the following details:

Your solicitor's name

FIONNGHUALA DEVEREAUX

Name of firm

DUNCAN LEWIS & CO SOLICITORS

Address VIKING HOUSE
17-19 PETERBOROUGH ROAD
HARROW ON THE HILL
MIDDLESEX
Postcode HA1 2AX

Telephone number 02085159161

Fax number 02079233320

DX number 4216 HARROW

Solicitor's Reference L01877/2/FD

Applicant 2 (if applicable) _____

Your first name _____

Middle name(s) _____

Surname _____

Previous surnames (if any) _____

Date of birth _____

Sex ☐ Male ☐ Female

Place of birth (town/county/country)_____

If your address details and those of your solicitor are different from the first applicant please provide details of these on a separate sheet

What is your relationship to the applicant listed above?_____

Please give details of the child(ren) and the order(s) you are applying for. If there are more than 4 children please continue on a separate sheet.

Child 1 _____

Child's first name **Redacted**

Middle name(s) **Redacted**

Surname **Redacted**

Sex **Redacted**

What is your relationship to the child Applicant 1

FATHER

Applicant 2

_____

Is the child known by the Local Authority children's services? ☐ Yes ☒ No ☐ Don't know

If Yes, what is the name of the:

Local Authority Social worker (If known)_____

Is the child subject of a child protection plan?

☐ Yes ☒ No ☐ Don't know

Who are the child's parents?

MANUEL JOSE LOZANO (APPLICANT)

DIANA, MONTOYA ALVAREZ (RESPONDENT)

Who does the child live with?

[redacted] LIVES WITH HER MOTHER AT AN UNDISCLOSED ADDRESS.

Please give the full names of any other adults living at the same address and their relationship to the child.

IT IS NOT KNOWN WHETHER ANY OTHER ADULTS AT THE SAME ADDRESS AS THE CHILD.

Child 2 _____

Child's first name _____

Middle name(s) _____

Surname _____

Sex ☐ Male ☐ Female

What is your relationship to the child

Applicant 1 _____

Applicant 2 _____

Is the child known by the Local Authority children's services? ☐ Yes ☐ No ☐ Don't know

If Yes, what is the name of the:

Local Authority Social worker (If known)_____

Is the child subject of a child protection plan?

☐ Yes ☐ No ☐ Don't know

Who are the child's parents? _____

Who does the child live with?_____

Please give the full names of any other adults living at the same address and their relationship to the child.

_____

Child 3 _____

Child's first name _____

Middle name(s)_____

Surname _____

Sex ☐ Male ☐ Female

What is your relationship to the child

Applicant 1_____

Applicant 2_____

Is the child known by the Local Authority children's services? ☐ Yes ☐ No ☐ Don't know

If Yes, what is the name of the:

Local Authority Social worker (If known)_____

Is the child subject of a child protection plan?

☐ Yes ☐ No ☐ Don't know

Who are the child's parents? _____

Who does the child live with?_____

Please give the full names of any other adults living at the same address and their relationship to the child.

_____

Child 4 _____

Child's first name _____

Middle name(s)_____

Surname _____

Sex ☐ Male ☐ Female

What is your relationship to the child

Applicant 1_____

Applicant 2_____

Is the child known by the Local Authority children's services? ☐ Yes ☐ No ☐ Don't know

If Yes, what is the name of the:

Local Authority Social worker (If known)_____

Is the child subject of a child protection plan?

☐ Yes ☐ No ☐ Don't know

Who are the child's parents? _____

Who does the child live with?_____

Please give the full names of any other adults living at the same address and their relationship to the child.

_____

Please give brief details about why you are making this application. You should include details of:

- any previous agreements (formal or informal), and how they have broken down
- your reasons for bringing this application to the court
- what you want the court to do.

Do not give a full statement, please provide a summary. You may be asked to provide a full statement later.

THE APPLICANT AND RESPONDENT SEPARATED ON 3RD NOVEMBER 2008 WHEN THE APPLICANT LEFT THE FAMILY HOME FURTHER TO THE RESPONDENT'S REQUEST. ON THE 20TH NOVEMBER 2008 THE APPLICANT SAW THE RESPONDENT AND IN THE STREET BUT THE RESPONDENT WOULD NOT SPEAK TO THE APPLICANT. THE APPLICANT HAS NOT SEEN HIS [redacted] SINCE THIS DATE. THE APPLICANT DOES NOT HAVE ANY DETAILS OF THE WHEREABOUTS OF HIS [redacted] AND IS WORRIED FOR [redacted] SAFETY AND WELFARE. THE APPLICANT HAS MADE ENQUIRIES OF THE RESPONDENT'S FAMILY AS TO HIS [redacted] WHEREABOUTS, BUT THEY HAVE BEEN UNABLE TO DISCLOSE HER LOCATION. OUR CLIENT ALSO SUSPECTS THAT THE RESPONDENT MAY REMOVE THE CHILD FROM THE UK AND THEREFORE REQUIRES A PROHIBITED STEPS ORDER TO ENSURE THAT THE CHILD REMAINS IN THE JURISDICTION OF ENGLAND AND WALES.

THE APPLICANT HAS MADE AN APPLICATION FOR AN ORDER TO DISCLOSE HIS [redacted] WHEREABOUTS UNDER S.33 FAMILY LAW ACT 1986. ONCE HIS [redacted] HAS BEEN TRACED THE APPLICANT WISHES TO OBTAIN A DEFINED CONTACT ORDER TO ENSURE THAT HE OBTAINS REGULAR CONTACT WITH HIS [redacted] AND PLAYS AN ACTIVE ROLE IN [redacted] LIFE. THE APPLICANT HAS PARENTAL RESPONSIBILITY FOR HIS [redacted].

Have you received a copy of the 'Parenting Plan: Putting your children first: A guide for Separating parents', booklet? ☒ Yes ☐ No

Have you used family mediation to attempt to agree arrangements for your children?

☐ Yes ☒ No

Please give brief details about:

- If you attended family mediation what was the outcome?
- If you did not use mediation please explain why?

THE RESPONDENT MOTHER DID NOT RESPOND TO THE MEDIATION SERVICE. THE APPLICANT'S SOLICITORS ALSO WROTE TO THE RESPONDENT'S SOLICITORS IN AN ATTEMPT TO NEGOTIATE AN AGREEMENT IN RELATION TO CONTACT, BUT THE APPLICANT'S PROPOSALS WERE NOT ACCEPTED.

Do you believe that the child(ren) named at Section 2 have suffered or are at risk of suffering any harm from any of the following:

- any form of domestic abuse

- violence within the household
- child abduction
- other conduct or behaviour by any person who has had contact with the child?

☒ Yes ☐ No ☐ Other

If Yes, please complete form C1A (Supplemental information form)

If Other, please give details _____

Are you aware of any other court cases now, or at any time in the past, which concern any of the child(ren) at Section 2?

☐ Yes

If Yes, please attach a copy of any relevant order and and the relevant details below.

☒ No

If No, please go to Section 7.

Additional details

Name of child(ren) _____

Name of the court where proceedings heard ____

Case No. _____

Date/year (if known) _____

Name of Cafcass/CAFCASS CYMRU officer ____

Name and address of child's solicitor, if known

_____

_____

Postcode _____

If the above details are _____
details on additional sheets.

Please tick if additional sheets are attached. ☐

Sections G and H of the booklet 'CB1—Making an application—Children and the Family Courts' explain who a respondent is.

If there are more than 2 respondents please continue on a separate sheet

Respondent 1 _____

Respondent's first name DIANA

Middle name(s) _____

Surname MONTOYA ALVAREZ

Previous surnames (if known) _____

Date of birth **Redacted**

Place of birth (town/county/country, if known) COLOMBIA

Address NOT KNOWN

Postcode _____

Have they lived at this address for more than 5 years? ☐ Yes ☒ No ☐ Don't know

If No, please provide all previous addresses for the last 5 years below, if known: **Redacted**

Relationship to the child(ren)

Name of child **REDACTED**

Relationship MOTHER

Respondent 2 _____

Respondent's first name _____

Middle name(s) _____

Surname _____

Previous surnames (if known) _____

Date of birth _____ Sex ☐ Male ☐ Female

Place of birth (town/county/country, if known)

Address _____

Postcode _____

Have they lived at this address for more than 5 years? ☐ Yes ☐ No ☐ Don't know

If No, please provide all _____

_____

Relationship to the child(ren)

Name of child _____

Relationship _____

There may be other people who should be notified of your application, for example, someone who cares for the child but is not a parent. Sections G and I of the booklet 'CB1—Making an application—Children and the Family Courts' explain who others are.

Person 1 _____

Person's first name _____

Surname _____

Date of birth _____ Sex ☐ Male ☐ Female

Address _____

Postcode _____

Relationship to the child(ren)

Name of Child _____

Relationship _____

Person 1 _____

Person's first name _____

Surname _____

Date of birth _____ Sex ☐ Male ☐ Female

Address _____

Postcode _____

Relationship to the child(ren)

Name of Child _____

Relationship _____

Print full name Manuel José Lozano

Signed /s/ Manuel José Lozano Applicant

Date 23/07/2009

Sections N of the booklet 'CB1—Making an application—Children and the Family Courts provides information about attending court.

If you require an Interpreter, you must tell the court now so that one can be arranged.

Do you or any of the parties need an interpreter at court? ☐ Yes ☒ No

If Yes, please specify the language and dialect

_____

If attending the court, do you or any of the parties involved have a disability for which you require special assistance or special facilities: ☐ Yes ☒ No

If Yes, please say what the needs are_____

Please say whether the court needs to make any special arrangements for you to attend court (e.g., providing you with a separate waiting room from the respondent or other security provisions). N/A

Court staff may get in touch with you about the requirements

What to do now:

☒ Check you have attached copies of any relevant orders (as per Section 6).

☒ Check you have signed the form Section 9.

☒ You must provide a copy of the application and attached documents for each of the respondents and one for the Children and Family Court Advisory and Support Service (Cafcass or CAFCASS CYMRU).

☒ Is Form C1A attached (if applicable)?

☐ Details of the additional children if there are more than 4 in Section 2

☒ Details of the additional respondents if there are more than 2 in Section 7

☒ Check you have attached the correct fee. The leaflet 'EX50 County court fees' provides information about court fees you will have to pay.

Now take or send your application with the correct fee and correct number of copies to the court.

Court fees

You may be exempt from paying all or part of the fee. The combined booklet and application form 'EX 160A Court Fees—Do you have to pay them' gives more information. You can get a copy from the court or download a copy from our website at www.justice.gov.uk

Form C1A

Supplemental Information Form

Children Act 1989

The court PRINCIPAL REGISTRY OF THE FAMILY DIVISION

The full name(s) of the child(ren)

REDACTED

Important Note

Please read the C1A Notes for Guidance before completing this form.

Section 1

1

*Do not state your address if you have asked the court to withhold your address

About you (the person completing this form)

Personal details

Full Name (including any title): MR. MANUEL JOSE LOZANO

Date of Birth:

Address*: **Redacted**

Day time telephone number:

Your relationship to each child named above:

Father

2

Your solicitor's details

Name: Duncan Lewis & Co Solicitors

Address:Viking House, 17-19 Peterborough Road, Harrow on the Hill, Middlesex, HA1 2AX

Reference: L01877/2/FD

Telephone Number: 0208 515 9161

Fax Number: 0207 923 3320

DX Number: 4216 Harrow

Section 2

Respondent's comments on allegations made by the Applicant

About this section:

Go straight to Section 3 (Further Information) if:

(a)you are the Applicant; or

(b)you are the Respondent and the Applicant has not filed form C1A Supplemental Information Form with his or her application.

This section of the form should only be completed by the Respondent where the Applicant has served a completed form C1A with his or her application for an order.

You do not have to complete this section unless you wish to comment on any of the information given by the Applicant in his or her form C1A. This section should not be used to comment on any other information given by the Applicant in his or her application.

Please comment in summary form only. You will have an opportunity to make a more detailed statement later in the proceedings.

Section 3

Further Information

1

Involvement with outside authorities and organisations

If as a result of any incidence of domestic abuse, other harm or risk of harm to you or the child(ren) there is, has been or there is pending any known Involvement with the police, social services, mental health services or other support services in respect of:

- *any child(ren) whose name(s) is/are given at the top of this form*
- *a full, half or step brother or sister of a child(ren) whose name(s) is/are given at the top of this form, or*
- *a person who is or has been involved in caring for the child(ren) or is having or has had contact with the child(ren) whose name(s) is/are given at the top of this form*

please provide details and identify:

- *which agency or service has been involved*

- *the name of the person who has been the main contact in that agency or service*
- *the date or dates of any involvement*
- *whether there is any current or continuing involvement*
- *whether or not you have any documents, reports or correspondence relating to the agency or service's involvement.*

N/A

2

Note: You shall have an opportunity later in the proceedings to provide a more substantial statement

Incidents of abuse, violence or harm

For each alleged incidence of violence, domestic abuse or harm, please provide in summary form the following information:

- *the date(s) on which the incident occurred*
- *the nature and seriousness of the alleged abuse, violence or harm*
- *by whom and against whom it was directed*
- *how frequently the alleged abuse, harm or violence occurred and the date(s) of the most recent occurrence(s)*
- *whether any hospital or medical treatment has been sought by the child(ren) whose name(s) is/are given at the top of this form, the applicant or other person in respect of any injuries sustained, and*

- *whether you consider there is a likelihood of further harm, abuse or violence occurring.*

THE APPLICANT AND RESPONDENT WOULD OFTEN ARGUE IN FRONT OF THE CHILDREN. THE APPLICANT ALWAYS TRIED TO AVOID THIS SO THAT HIS [redacted] WOULD NOT BE DISTRESSED. THE APPLICANT SUBMITS THAT THE RESPONDENT HAS MENTAL HEALTH ISSUES.

THE RESPONDENT WOULD ALSO VERBALLY ABUSE THE APPLICANT IN FRONT OF THE CHILD AND CALL THE APPLICANT ABUSIVE NAMES. THE RESPONDENT WOULD ALSO TELL THE CHILD THAT [redacted] FATHER WAS EVIL LIKE THE DEVIL.

THE APPLICANT BELIEVES THE CHILD MAY HAVE BEEN ADVERSELY AFFECTED BY SUCH BEHAVIOUR.

3

Involvement of the child(ren)

If the child(ren)whose name(s) is/are given at the top of this form have seen or heard any of the alleged incident(s) of abuse within the household or been aware of any alleged abuse and its impact on the family, please give details and in particular state how you believe the child(ren) have been affected by this experience:

THE CHILD HAS HEARD THE APPLICANT AND RESPONDENT ARGUE ON OCCASIONS. THE RESPONDENT IS USING HER BEST EFFORTS TO TURN THE CHILD AGAINST THE APPLICANT AND MAKE HER FORGET HER

FATHER. THE RESPONDENT OFTEN TOLD THE CHILD THAT HER FATHER WAS A BAD MAN AND COMPARED HIM TO THE DEVIL. THIS RESULTED IN THE CHILD POINTING TO BAD OBJECTS AND CALLING THEM DADDY.

4

Witnesses

Has anyone else seen, heard or had reported to them any alleged incidence of violence, domestic abuse or harm? If Yes, would that person be able to provide supporting evidence?

No.

5

Medical treatment or other assessment of the child(ren)

If any child(ren) whose name(s) is/are given at the top of this form have been referred for treatment or psychiatric or psychological assessment, by any medical or health service relating to his/her emotional, social or behavioural development (or where any such treatment or referral is pending), please state:

- *when and to whom such a referral was made*
- *details of any treatment or assessment recommended*
- *whether there is any continuing involvement with the relevant service in relation to the referral, and*
- *whether you are aware of or have in your possession any reports or other correspondence in*

relation to any treatment or assessment recommended.

N/A

6

Abduction

If you feel the child(ren) whose name(s) is/are given at the top of this form are at real risk of being abducted please give the following information:

- *your reason for believing that the child(ren) may be abducted*
- *whether the child(ren) have previously been the subject of a threatened abduction, an attempted abduction or have been abducted*
- *whether the police or any other organisation has been involved in any alleged previous incident identified above, and*
- *whether each child has their own passport and who has that passport at the moment?*

THE RESPONDENT WAS BORN IN COLOMBIA AND STILL HAS FAMILY THERE. THE APPLICANT BELIEVES THAT THERE IS A POSSIBILITY THAT SHE MAY RETURN THERE TO LIVE.

WHEN THE PARTIES SEPARATED IN NOVEMBER 2008, THE RESPONDENT THREATENED TO TAKE THE CHILD TO THE USA PERMANENTLY. THE RESPONDENT HAS SIBLINGS IN THE USA WHO WOULD BE ABLE TO SUPPORT HER. THE APPLICANT IS THEREFORE WORRIED THAT THE RESPONDENT MAY

REMOVE HIS CHILD FROM THE UK WITHOUT HIS KNOWLEDGE, DESPITE THE FACT THAT HE HAS PARENTAL RESPONSIBILITY.

7

Steps or orders required to protect you and the children

Please indicate what steps or orders you believe the court should take or make in order to protect the safety of the child(ren) whose name(s) is/are given at the top of this form and/or yourself.

THE APPLICANT FATHER WISHES TO HAVE REGULAR AND FREQUENT CONTACT WITH HIS [redacted], IN ORDER TO ENSURE THAT [redacted] IS WELL AND HAS A HEALTHY AND BALANCED LIFE. THE APPLICANT ALSO WISHES TO OBTAIN A PROHIBITED STEPS ORDER TO PREVENT THE RESPONDENT FROM REMOVING THE CHILD FROM THE JURISDICTION WITHOUT HIS KNOWLEDGE.

8

Attending the Court

Please also indicate whether the court needs to make any special arrangements for you to attend court (e.g. providing you with a separate waiting room from the respondent or other security provision). Do you consider the court should give consideration to any special measures for you or any witnesses to give evidence at the hearing (e.g. use of video link equipment where available)? If Yes, please explain why.

N/A

Signed

(Applicant [redacted]) /s/

Date 23-07-2009

Form C4

Application for an order for disclosure of a child's whereabouts

Section 33 Family Law Act 1986

The court

PRINCIPAL REGISTRY OF THE FAMILY DIVISION

The full name(s)(of the child(ren)

REDACTED

1

About you (the applicant)

State

- *your title, full name, address, telephone number, date of birth and relationship to each child above*
- *your solicitor's name, address, reference, telephone, FAX and DX numbers.*

MR MANUEL JOSE LOZANO (D.O.B.— REDACTED); I AM THE FATHER OF THE NAMED CHILD.

TELEPHONE: REDACTED

L01877/2/FD/KR

DUNCAN LEWIS & CO. SOLICITORS, VIKING HOUSE, 17-19 PETERBOROUGH ROAD, HARROW ON THE HILL, MIDDLESEX, HA1 2AX.

TEL: 0208 515 9161 FAX: 0207 923 3320 DX: 4216 HARROW.

2

The child(ren)

For each child state

- *the full name, date of birth and sex*
- *the title, full name, address, telephone number of the person believed to have actual control of the child*
- *details which identify the child. You may enclose a recent photograph of the child, which should be dated*

REDACTED

MISS DIANA MONTOYA ALVAREZ IS THE MOTHER OF THE NAMED CHILD AND IS BELIEVED TO HAVE CONTROL OF THE CHILD. HOWEVER, HER ADDRESS IS UNKNOWN TO THE APPLICANT.

3

The order you are seeking

State

- *the name(s) of the person(s) to be directed by the Court to disclose relevant information as to the whereabouts of the child*
- *specific directions you would like the court to give as to when and how the information shall be disclosed to the court.*

THE COURT TO ORDER AND DIRECT:

1) DR SIDDIQUI, OF 21 WALNUT WAY, SOUTH RUISLIP, MIDDLESEX, HA4 6TA TO GIVE ALL THE INFORMATION HE HAS ABOUT WHERE THE CHILD AND ADULT ARE NOW, OR WHERE THEY WERE WHEN YOU LAST KNEW AND WHERE THEY ARE LIKELY TO BE NOW.

2) CHILD BENEFIT OFFICE, PO BOX 1, NEW-CASTLE-UPON-TYNE, N888 1AA TO GIVE ALL THE INFORMATION THEY HAVE ABOUT WHERE THE CHILD AND ADULT ARE NOW, OR WHERE THEY WERE WHEN THEY LAST KNEW AND WHERE THEY ARE LIKELY TO BE NOW.

3) YOU REDACTED

[redacted] TO GIVE ALL THE INFORMATION SHE HAS ABOUT WHERE THE CHILD AND ADULT ARE NOW, OR WHERE THEY WERE WHEN YOU LAST KNEW AND WHERE THEY ARE LIKELY TO BE NOW.

BY WRITING.

4

The grounds for the application

State why you believe that

- *the court does not have adequate information as to where the child is.*
- *the person(s) to whom the order is directed may have relevant information.*

[redacted] IS THE SISTER OF THE RESPONDENT AND IS LIKELY TO HAVE INFORMATION REGARDING THE WHERE-ABOUTS OF THE RESPONDENT AND CHILD.

DR SIDDIQUI IS THE GP OF THE RESPONDENT AND THE CHILD AND IS LIKELY TO HAVE A FORWARDING ADDRESS FOR THE RESPONDENT'S NEW GP.

Signed

(Applicant) /s/

Date 23-07-2009

Form C4

Application for an order for disclosure of a child's whereabouts

Section 33 Family Law Act 1986

The court

PRINCIPAL REGISTRY OF THE FAMILY DIVISION

The full name(s) of the child(ren)

REDACTED

1

About you (the applicant)

State

- *your title, full name, address, telephone number, date of birth and relationship to each child above*
- *your solicitor's name, address, reference, telephone, FAX and DX numbers.*

MR MANUEL JOSE LOZANO **REDACTED** I AM THE FATHER OF THE NAMED CHILD.

Redacted

L01877/2/FD/KR

DUNCAN LEWIS & CO. SOLICITORS, VIKING HOUSE, 17-19 PETERBOROUGH ROAD, HARROW ON THE HILL, MIDDLESEX, HA1 2AX. TEL: 0208 515 9161 FAX: 0207 923 3320 DX: 4216 HARROW.

2

The child(ren)

For each child state

- *the full name, date of birth and sex*
- *the title, full name, address, telephone number of the person believed to have actual control of the child*
- *details which identify the child. You may enclose a recent photograph of the child, which should be dated*

REDACTED

MISS DIANA MONTOYA ALVAREZ IS THE MOTHER OF THE NAMED CHILD AND IS BELIEVED TO HAVE CONTROL OF THE CHILD. HOWEVER, HER ADDRESS IS UNKNOWN TO THE APPLICANT.

3

The order you are seeking

State

- *the name(s) of the person(s) to be directed by the Court to disclose relevant information as to the whereabouts of the child*

- *specific directions you would like the court to give as to when and how the information shall be disclosed to the court.*

THE COURT TO ORDER AND DIRECT:

NORTHWOOD POLICE STATION, 2 MURRAY ROAD, NORTHWOOD, MIDDLESEX, HA6 2YN TO DISCLOSE ALL THE INFORMATION THEY HAVE ABOUT THE CURRENT WHEREABOUTS OF THE CHILD [redacted] AND ADULT DIANA MONTOYA ALVAREZ OR ANY INFORMATION YOU MAY HAVE IN RELATION TO THE WHEREABOUTS OF [redacted] AND DIANA MONTOYA ALVAREZ

BY WRITING.

4

The grounds for the application

State why you believe that

- *the court does not have adequate information as to where the child is.*
- *the person(s) to whom the order is directed may have relevant information.*

NORTHWOOD POLICE STATION INVESTIGATED CLAIMS OF RAPE MADE BY THE RESPONDENT AGAINST THE APPLICANT IN MARCH 2009 AND ARE LIKELY TO HAVE INFORMATION REGARDING THE WHEREABOUTS OF THE RESPONDENT AND CHILD.

Signed

(Applicant) /s/

Date 20/11/09

IN THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

Case Number:

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1986

AND IN THE MATTER OF [redacted] **(D.O.B.** [redacted]**)**

BETWEEN:

MANUEL JOSE LOZANO

Applicant

-and-

DIANA MONTOYA ALVAREZ

Respondent

[redacted]

I, Manuel Jose Lozano, the above named Applicant, of **Redacted**

Redacted and say as follows:—

1. I make this statement in support of my application for the disclosure of the whereabouts of my child, **REDACTED** born on **REDACTED**, [redacted] under Section 33 Family Law Act 1986. I am also applying for a Contact Order under Section 8 of the Children Act 1989.

Background

2. By way of background, I was in a relationship with the Respondent, Miss Diana Montoya Alvarez from August 2005 until 17th November 2008.

There is one child of the relationship, namely **Redacted** born on **Redacted**

3. The Respondent and I lived together at **REDACTED**

   REDACTED. Therefore, I was with my child every day for over three years. I had an extremely close bond, with my [redacted] and helped take care of [redacted] on a daily basis. I also provided for my [redacted] financially.

4. On 17th November 2008, the Respondent returned from a week long holiday after visiting family in New York [without] with [redacted]. [ML] I went to collect the Respondent [not] [redacted] and [redacted] [ML] from the airport [without] [ML] with my mother. When we arrived home the Respondent told me and my mother that we had to leave the former family home. The Respondent gave me no indication of why she had come to this decision.

   In or around the 21st/22nd November 2008, I saw the Respondent and [redacted] in the street but the Respondent would not speak to me. I have not seen my [redacted] since this date. I was informed by South Harrow Police that the Respondent and [redacted] had not left the country and that they were keeping in reg-

ular contact with [redacted]. I am extremely worried as I am unsure as to why the Respondent would need to keep the location of my a secret from me and therefore, I am concerned for my child's welfare.

5. I received a letter from the Respondent's solicitors on 27th March 2009. The letter stated that the respondent had fled the former family home as a result of my violent and aggressive behaviour culminating in rape of the Respondent on four separate occasions. I deny all these allegations as I have never been violent towards the Respondent. It is true that our relationship was not perfect, but I would never harm the Respondent in any way. I am prepared to co-operate with any Police Investigation to prove my innocence.

6. I am particularly concerned about the Respondent's care of my child. Before I separated from the Respondent, she would often try to turn my child against me by comparing me to evil images like the devil. This was very frightening for my [redacted] and I feel that the Respondent was deliberately trying to alienate my [redacted] from me to prevent me from having contact with her.

7. I am also concerned that the Respondent may remove my child from the jurisdiction of England and Wales. The Respondent was born in Columbia and still has family and friends there. I am worried that the Respondent may return there with my [redacted] to live without my knowledge. The Respondent also has siblings in the USA and has often expressed a

wish to live in New York so that she is closer to them. I therefore believe that there is a significant risk that the Respondent may move to the USA with my [redacted] so that I cannot see her.

8. I have tried to obtain contact details for the Respondent and my [redacted] through the Respondent's siblings who live in London, with whom I used to have a very good relationship. However, they have stated that they do not know the Respondent's whereabouts. I do not believe this as the Respondent was always very close to her family in London and it is highly unlikely that she would not have told them where she is living.

9. Since receiving the letter from the Respondent's solicitors dated 27th March 2009, I have not attempted to contact the Respondent. However, I am very concerned about the safety and welfare of my child. I have asked my solicitors to write to South Harrow Police station for further information as to the allegations made by the Respondent.

10. I am certain that the Respondent's sister, [redacted] knows the whereabouts of her sister and my [redacted] and therefore wish to serve them with a S.33 Family Law Act 1986 Disclosure Order. I also wish to serve the Order on the Department of Social Security, as the Respondent was claiming benefits in relation to our [redacted] and is likely to still be in receipt of these benefits. I also believe that the Respondent's GP should be served as he

may have a forwarding address for the Respondent.

11. My main concern is to ascertain the whereabouts of my child, so that I am able to make an application for contact. I am concerned about the Respondent's lack of stability and the effect this may have on our child. I wish to resume regular contact with my [redacted] and believe that arrangements should be formalised into a Defined Contact Order, so that both the Respondent and I know where we stand. More importantly, I believe it to be in my [redacted] best interests for contact to be reinstated, as swiftly as possible, so that [redacted] can have a healthy and balanced relationship with both [redacted] parents.

12. I am unaware as to whether or not the Respondent has already left the country with our [redacted] but this could be a possibility.

13. In the circumstances, I wish to obtain a Section 33 Family Law Act 1986, Disclosure of Whereabouts Order and serve this upon the Respondent's previous GP, the Respondent's sister, and the Child Benefits Office in Newcastle-Upon-Tyne. Once I have ascertained the whereabouts of my child and the Respondent, I will be in a position to serve the Respondent with notice of the Section 8 Children Act 1989 proceedings. It may also be necessary to serve the Section 33 Family law Act 1986 Order on any other relevant institutions, authorities or individuals as deemed appropriate by the Court.

14. Once a Disclosure Order has been obtained and served, the Court will be in a position to determine the issues of contact and any other relevant matters concerning the welfare of my child.

Dated 23rd July 2009

Signed /s/_____

Manuel Jose Lozano

Sworn at

on the 23rd day of July 2009

Before me /s/ David Nardhra
David Nardhra
CAPLANS, Solicitors
12 Peterborough Road
Harrow HA1 2BB

An Officer of a Court appointed by the Judge to take _____

A Solicitor/Commission for Oaths

IN THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

Case Number:

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1986

AND IN THE MATTER OF

Redacted

BETWEEN:

MANUEL JOSE LOZANO

Applicant

-and-

DIANA MONTOYA ALVAREZ

Respondent

[redacted]

Duncan Lewis & Co. Solicitors
17 - 19 Peterborough Road
Harrow
Middlesex
HA1 2AX
Tel: 020 2515 3623
Fax: 020 7923 3328
DX: 4216 Harrow
Ref: L01877/2FD/KR

Solicitors for the Applicant

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

Notice of Proceedings

Directions Appointment

[REGISTRY STAMP]

Manuel Jose Lozano has applied to the court for an order.

The application concerns the following child: **Redacted**

About the Directions Appointment

You should attend when the Court hears the application at Principal Registry of The Family Division, First Avenue House, 42-49 High Holborn, London, WCIV 6NP on 16th September 2009 at 10:30 am with a hearing time estimate of 15 MINUTES.

What to do next

There is a copy of the application with this Notice. You have been named as a party in the application. Read the application now, and the notes overleaf.

When you go to court please take this Notice with you and show it to a court official.

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Order To disclose information about the whereabouts of a missing child

Section 33 Family Law Act 1986

The full name(s) of the child(ren):

Boy/ Girl

Date(s) of Birth:

Redacted

The adult who is believed to have the child is Diana Montoya Alvarez.

Warning

Read this Order now. The Court has ordered you to give information and you must give it at once. If you do not, you may be in contempt of court and you may be fined, sent to prison or detained.

Upon the proceedings being transferred to the High Court for the purposes of this application only,

The Court orders and directs

You [redacted] to give all the information you have about where the child and adult are now, or where

they were when you last knew and where they are likely to be now.

You must give the information in writing forthwith, that is as soon as practicable, to Ruth Ewen, an officer of
Principal Registry of The Family Division Court
First Avenue House
42-49 High Holborn
London
WCIV 6NP
TEL: 0207 947 6000

Ordered by District Judge Segal

on16th September 2009

[REGISTRY SEAL]

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

The full name(s) of the child

Boy or Girl

Date(s) of Birth

Redacted

Order

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

UPON HEARING Counsel for the Applicant Father in this matter,

AND UPON the matter being transferred to the High Court for the purposes of this Application only

THE COURT ORDERS THAT:

1. HM Revenue and Customs, The Child Benefit Office, PO Box 1, Newcastle-upon-Tyne, NE98 1AA by its officers, servants or agents shall disclose, in writing, as soon as practicable to Ruth Ewen, Principal Registry of the Family Division, First Avenue House, 42-49 High Holborn, London WCIV 6NP all information in its knowledge or control of the whereabouts of the Respondent, Diana Montoya Alvarez
2. HM Revenue and Customs, The Child Benefit Office, by its officers, servants or agents shall not disclose the content of this order or any

action they take pursuant to it, to Diana Montoya Alvarez

3. There be liberty to HM Revenue and Customs, The Child Benefit Office to apply to vary or discharge this order upon 24 hours notice.

Ordered by[12]

[STAMPED SEAL]

District Judge Segal of the Principal Registry of the Family Division

On[13]

16th September 2009

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Order To disclose information about the whereabouts of a missing child

Section 33 Family Law Act 1986

The full name(s) of the child

Boy or Girl

Date(s) of Birth

Redacted

The adult who is believed to have the child is Diana Montoya Alvarez.

Warning

Read this Order now. The Court has ordered you to give information and you must give it at once. If you do not, you may be in contempt of court and you may be fined, sent to prison or detained.

Upon the proceedings being transferred to the High Court for the purposes of this application only,

The Court orders and directs

You Dr Siddiqui, 21 Walnut Way, South Ruislip, Middlesex HA4 6TA to give all the information you have about where the child and adult are now,

or where they were when you last knew and where they are likely to be now.

You must give the information in writing forthwith, that is as soon as practicable, to Ruth Ewen, an officer of
Principal Registry of The Family Division Court
First Avenue House
42-49 High Holborn
London
WCIV 6NP
TEL: 0207 947 6000

Ordered by District Judge Segal

on16th September 2009

Ordered by District Judge Segal

on16th September 2009

[REGISTRY SEAL]

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Order To disclose information about the whereabouts of a missing child

Section 33 Family Law Act 1986

The full name(s) of the child

Boy or Girl

Date(s) of Birth

Redacted

The adult who is believed to have the child is Diana Montoya Alvarez.

Warning

Read this Order now. The Court has ordered you to give information and you must give it at once. If you do not, you may be in contempt of court and you may be fined, sent to prison or detained.

Upon the proceedings being transferred to the High Court for the purposes of this application only,

The Court orders and directs

You Messrs. Amphlett Lissimore, Greystoke House, 82-86 Westhill Street, London SE19 3AF to give all the information you have about where the

child and adult are now, or where they were when you last knew and where they are likely to be now.

You must give the information in writing forthwith, that is as soon as practicable, to Ruth Ewen, an officer of
Principal Registry of The Family Division Court
First Avenue House
42-49 High Holborn
London
WCIV 6NP
TEL: 0207 947 6000

Ordered by District Judge Segal

on16th September 2009

Ordered by District Judge Segal

on16th September 2009

Ordered by District Judge Segal

on16th September 2009

[REGISTRY SEAL]

IN THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

CASE NUMBER FD09P01743

BETWEEN

MR MANUEL JOSE LOZANO

APPLICANT

AND

MS GLORIA MONTOYA ALVAREZ

RESPONDENT

AFFIDAVIT OF SERVICE

I ROGER HULL a process server, of Spectra Investigations, Bakers House, 25 Bakers Road, Uxbridge, Middlesex, UB8 1RG.

DO MAKE AN OATH AND SAY as follows:—

1. I am over 16 years of age and employed for the purpose of this service by Duncan Lewis & Co., Solicitors, Viking House, 17/19, Peterborough Road, Harrow on the Hill, Middlesex HA1 2AX

2. I did, on Tuesday 29th September 2009 at 1630 hours go to **REDACTED**

   REDACTED where I saw a woman who identified herself to me as [redacted], the Respondent in the matter herein.

3. I served the papers on [redacted] the respondent in the matter therein which she accepted.

4. I attach herewith a copy of the documents served on [redacted] and duly exhibit them herewith marked RH/1.

SWORN AT UXBRIDGE COUNTY COURT
in the London Borough of HILLINGDON
this 30th day of September 2009)

Before me /s/

[R Hull]

[UXBRIDGE COUNTY COURT STAMP]

~~Solicitor/Commissioner of Oaths~~
or Officer of a Court appointed by the
Judge to take AFFIDAVITS

IN THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

CASE NUMBER FD09P01743

BETWEEN

MR MANUEL JOSE LOZANO

APPLICANT

AND

MS GLORIA MONTOYA ALVAREZ

RESPONDENT

EXHIBIT

This is the Exhibit marked RH/1 referred to in the Affidavit of ROGER HULL.

[R Hull]

SWORN at UXBRIDGE COUNTY COURT)
in the London Borough of HILLINGDON)
this 30th day of September 2009)

Before me /s/

[UXBRIDGE COUNTY COURT STAMP]

~~Solicitor/Commissioner for Oaths~~
or Officer of a Court appointed by the Judge to take Affidavits

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Order To disclose information about the whereabouts of a missing child

Section 33 Family Law Act 1986

The full name(s) of the child

Boy or Girl

Date(s) of Birth

Redacted

The adult who is believed to have the child is Diana Montoya Alvarez.

Warning

Read this Order now. The Court has ordered you to give information and you must give it at once. If you do not, you may be in contempt of court and you may be fined, sent to prison or detained.

Upon the proceedings being transferred to the High Court for the purposes of this application only,

The Court orders and directs

You [redacted], **Redacted** give all the information you have about where the child and adult are now,

or where they were when you last knew and where they are likely to be now.

You must give the information in writing forthwith, that is as soon as practicable, to Ruth Ewen, an officer of
Principal Registry of The Family Division Court
First Avenue House
42-49 High Holborn
London
WCIV 6NP
TEL: 0207 947 6000

Ordered by District Judge Segal

on16th September 2009

[REGISTRY SEAL]

HER MAJESTY'S COURTS SERVICE

hmcs

HER MAJESTY'S COURTS SERVICE
Principal Registry of the
Family Division
First Avenue House
42-49 High Holborn
London
WCIV 6NP
DX 396 LONDON/CHANCERY LANE
T 0207 947 6000
F
Minicom VII 0191 4781476
(Helpline for the deaf and hard of hearing)
www.hmcourts-service.gov.uk

Our ref: RAE/7.06

Your ref: L01877/2/Fd/Stb

Duncan Lewis & Co
Solicitors
Dx 4216
Harrow

13th October 2009

Dear Sirs

Re:FD09P01743

Redacted

Further to our telephone conversation this morning, I am writing to confirm the information about addresses I gave you then.

Following the making of disclosure orders against a number of individuals or organisations I can confirm the following information given to the court:

(i) Amphlett Lissimore, solicitors previously acting for the Respondent mother Diana Montoya Alvarez, have stated that the last address they have on file for her was that of a Women's Refuge where their then client was living in May 2009; however when they checked with the refuge in July 2009 they were told that the mother and child [redacted] were no longer there but had moved on. They have no other information or knowledge of where they might now be.

(ii) The Child Benefit Office of HM Revenue & Customs have confirmed that the address they have on record for mother and child is the same refuge address known to her previous solicitors.

(iii) The Respondent's sister, [redacted]. has written to the court to state that she has no knowledge of the whereabouts of her sister or the child [redacted].

(iv) Dr. Siddiqui has confirmed that they last saw the Respondent as a patient in September 2008 and that the address they have on file for her is that already known to the Applicant, namely [redacted]. He also confirmed that the child [redacted] has never been registered as a patient with his practice and he has no knowledge of the whereabouts of the Respondent and her [redacted].

Yours faithfully,

/s/ Ruth Ewen

Ruth Ewen
Deputy Court Manager

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Order To disclose information about the whereabouts of a missing child

Section 33 Family Law Act 1986

The full name(s) of the child

Boy or Girl

Date(s) of Birth

Redacted

The adult who is believed to have the child is Diana Montoya Alvarez.

Warning

Read this Order now. The Court has ordered you to give information and you must give it at once. If you do not, you may be in contempt of court and you may be fined, sent to prison or detained.

The Court orders and directs

You the Senior Station Officer of Northwood Police Station to give all the information you have about where the child and adult are now, or where they were when you last knew and where they are likely to be now.

You must give the information forthwith, that is as soon as practicable, to the Judicial Secretariat of the Principal Registry of The Family Division, First Avenue House, 42-49 High Holborn, London WCIV 6NP, Tel: 0207 947 6000

Ordered by District Judge Bowman

on15th December 2009

[SEAL]

METROPOLITAN POLICE

Working together for a safer London

**[DUNCAN LEWIS & CO.
24 JAN 2010
RECEIVED]**

DIRECTORATE OF LEGAL SERVICES
Director: Edward Solomons
Solicitor
New Scotland Yard
Broadway
London SW1H 0BG

DX 134700 VICTORIA 7
Enquiries to: Tracey Tuffuor

Direct line:020 7230 4798
Facsimile:020 7230 7516
Switchboard:020 7230 1212

Your ref: L/01877/1/FD/STB

Our ref: L/37871/TAT

18 January 2010

Duncan Lewis & Co. Solicitors

Dx 4216 Harrow

Dear Sirs

Re: Your client: Manuel Lozano

I write further to your letter dated 13 January 2010 addressed to Harrow Police Station.

I act for the Commissioner of the Metropolitan Police Service (MPS) in this matter. Please send future correspondence about this case to me.

I note from your letter that you are aware that Ms Alvarez was housed in a refuge. The MPS is aware from its past contact with Ms Alvarez (the last being in 2008) that she did not wish your client to know her whereabouts.

I have replied directly to District Judge Bowman who made the Order. Please contact the court for further directions in this case.

Yours faithfully

/s/ Tracey Tuffuor

Tracey Tuffuor

Directorate of Legal Services

Lexcel

Practice Management Standard

Law Society Acredited

HER MAJESTY'S COURTS SERVICE

hmcs

HER MAJESTY'S COURTS SERVICE
Principal Registry of the
Family Division
First Avenue House
42-49 High Holborn
London
WCIV 6NP
DX 396 LONDON/CHANCERY LANE
T 0207 947 6000
F
Minicom VII 0191 4781476
(Helpline for the deaf and hard of hearing)
www.hmcourts-service.gov.uk

Our ref: ya/cs

Your ref: 101877/2/FD/KR

[DUNCAN LEWIS & Co.
01 FEB 2010
RECEIVED]

Duncan Lewis & Co.

DX4216 HARROW

26th January 2010

Dear Sir/Madam

Re:FD09P01743

Redacted

Your letter of 12th January 2010 has been referred to District Judge Bowman. Your application dated 20th November 2009 for disclosure of information from Northwood Police Station was

received by the Court and acted on by order dated 15th December 2010. The Metropolitan Police Directorate of Legal Service has responded by letter dated 18th January 2010. An edited copy of this letter is attached to this letter. The editing relates only to the identity and telephone number of the person at the Refuge (in the last paragraph).

It would appear that the Police and Refuge have no information which they can give you. You will also, by now have received a notice of further hearing for 14th April 2010. H.M. Revenue and Customs and Amphlett Lissimore solicitors have no information apart from the address of the Refuge (which the Mother appears to have left in mid 2009).

The District Judge is making a second disclosure order against H. M. Revenue in the hope that their records will now have been updated.

Yours faithfully,

/s/ Yilsen Ahmet
Yilsen Ahmet
Court Section
Extension: 6020

METROPOLITAN POLICE

Working together for a safer London

18 January 2010

DIRECTORATE OF LEGAL SERVICES

Director:

Enquiries to:

Direct line:
Facsimile:
Switchboard:

Your ref: FD09P01743

Our ref:

STRICTLY PRIVATE AND CONFIDENTIAL
OPEN BY ADDRESSEE ONLY

District Judge Bowman
Principal Registry of the Family Division
DX: 396 London/Chancery Lane

CONFIDENTIAL—NOT FOR DISCLOSURE TO PARTIES

Dear Judge Bowman

Redacted

I act for the Commissioner of the Metropolitan Police Service (MPS) in relation to an Order that you made against the MPS on 15 December 2009.

I enclose a copy of the Order for ease of reference. It directs my client to disclose all the information in his possession about the whereabouts of the Ms Alvarez and her **REDACTED**

The Order was served on the MPS on 13 January 2010 by Duncan Lewis & Co. Solicitors who I understand represent the father in the proceedings, Mr Manuel Lozano.

I made enquiries with the Child Abuse Investigation Team (CAIT) at Northwood and am told by my client that the last direct contact that the MPS had with Ms Alvarez was in 2008 when she was interviewed at Uxbridge Police Station. She alleged that Mr Lozano has mentally abused her and may have subjected her to sexual assaults during their relationship. She had therefore fled their home address and sought accommodation in a refuge.

Police could not make out any offences from the evidence that Ms Alvarez gave and were therefore unable to pursue a criminal investigation against Mr Lozano.

The refuge where Ms Alvarez went to stay in 2008 have informed the MPS that they do not consent to their contact details being given to the court because it may endanger residents there if their details become known. The effectiveness of the refuge depends on their services being kept confidential.

The refuge confirmed to my client today however, that Ms Alvarez left the refuge in July 2009 and left no forwarding address. The MPS has had no contact with Ms Alvarez since 2008 and does not know her current address.

The refuge has told my client that should the court alone wish to speak to a staff member at the refuge directly, the court may contact

I trust that this is of assistance.

Yours sincerely,

/s/

Directorate of Legal Services

Lexcel

Practice Management Standard

From: 02079476473

Page: 1/1

Date: 2/12/2010 10:51:02 AM

[LOGO]

IN THE HIGH COURT OF JUSTICE

In the Principal Registry of the Family Division

Case Number: FD09P01743

The full name(s) of the child(ren):

Boy or Girl

Date(s) of Birth:

REDACTED

Order

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

UPON READING the first request sent to HM Revenue and Customs dated 16th September 2009.

AND UPON the matter being transferred to the High Court for the purpose of this Application only.

THE COURT ORDERS THAT BY WAY OF SECOND REQUEST:—

1. HM Revenue & Customs, The Child Benefit Office, PO Box 1, Newcastle-upon-Tyne, NE98 1AA by its officers, servants or agents shall disclose, in writing, as soon as practicable to Judicial Secretariat, Principal Registry of the

Family Division, First Avenue House, 42-49 High Holborn, London WCIV 6NP all information in its possession or control as to the whereabouts of the Respondent, Diana Montoya Alvarez, and particularly as to her whereabouts since September 2009.

2. HM Revenue & Customs, by its officers, servants or agents shall not disclose the content of this order or any action they take pursuant to it, to

3. There be liberty to HM Revenue & Customs to apply to vary or discharge this order upon 24 hours notice.

Ordered by District Judge

District Judge Bowman of the Principal Registry of the Family Division

On 29 January 2010

The Court Office is open from 10 a.m. to 4.00 p.m. on Mondays to Fridays. Please address all correspondence to the Court Manager.

This fax was received by GFI FAXmaker fax server. For more information, visit http/www.gfi.com

HER MAJESTY'S COURTS SERVICE

hmcs

HER MAJESTY'S COURTS SERVICE
Principal Registry of the
Family Division
First Avenue House
42-49 High Holborn
London
WCIV 6NP
DX 396 LONDON/CHANCERY LANE
T 0207 947 6000
F
Minicom VII 0191 4781476
(Helpline for the deaf and hard of hearing)
www.hmcourts-service.gov.uk

Our ref: SC

Your ref: 101877/2/FD/KR

Duncan Lewis & Co
DX4216 HARROW

22 February 2010

Dear Sirs

Re:FD09P01743

REDACTED

Further to the letter of the 26th January, a letter dated 10th February 2010 has been received from HM Revenue & Customs informing the court that the address held for the mother is the address of the Refuge.

Yours faithfully,

/s/ Suzy Cottingham
Suzy Cottingham
Clerk to the Senior District Judge

(STAMPED)

[DUNCAN LEWIS & CO.

24 FEB 2010

RECEIVED]

[LOGO]

HM Revenue & Customs

Child Benefit Office
Benefits & Credits
Waterview Park
District 15
Mandarin Way
Washington
NE38 8QG

Phone 0845 302 1444
6am to 8pm

www.hmrc.gov.uk

Duncan Lewis & Co
Viking House
17-19 Peterborough Road
Harrow on the Hill
Middlesex
HA1 2AX

(STAMPED)
[DUNCAN LEWIS & Co.
RECEIVED]

Date 22 February 2010

Our ref

Your ref L01877/2/FD/STB

Dear Sir or Madam

Thank you for your letter dated 15 February 2010 and copy of Court Order FD09P01743.

A reply to this order was sent to the court on 10 February 2010.

Yours faithfully

/s/ Margaret Lloyd
Margaret Lloyd
Administrative Officer

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

Notice of Proceedings Directions Appointment

Manuel Jose Lozano has applied to the court for an order.

The application concerns the following child: **Redacted**

[REGISTRY STAMP]

About the Directions Appointment

You should attend when the Court hears the application at Principal Registry of The Family Division, First Avenue House, 42-49 High Holborn, London, WC1V 6NP on 14th April 2010 at 12:30 pm with a hearing time estimate of 30 minutes.

What to do next

There is a copy of the application with this Notice. You have been named as a party in the application. Read the application now, and the notes overleaf.

When you go to court please take this Notice with you and show it to a court official.

EXH-77

[LOGO]

In The Principal Registry of the Family Division

Case Number: FD09P01743

Notice of Proceedings

Directions Appointment

Manuel Jose Lozano has applied to the court for an order.

The application concerns the following child: **Redacted**

[REGISTRY STAMP]

About the Directions Appointment

You should attend when the Court hears the application at Principal Registry of The Family Division, First Avenue House, 42-49 High Holborn, London, WCIV 6NP on 14th April 2010 at 12:30 pm with a hearing time estimate of 30 minutes.

What to do next

There is a copy of the application with this Notice. You have been named as a party in the application. Read the application now, and the notes overleaf.

When you go to court please take this Notice with you and show it to a court official.

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
White Plains Division

Case No. ____

In re the Application of: Manuel Jose Lozano

Manuel Jose Lozano

Redacted

Petitioner,

vs.

Diana Lucia Montoya Alvarez

Redacted

Respondent.

ORDER FOR ISSUANCE OF WARRANT IN LIEU OF A WRIT OF HABEAS CORPUS

The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct 1980 Article 7(b) International Child Abduction Remedies Act, 42 U.S.C. §11604

Upon filing and reading of the Emergency Petition for Warrant of Arrest in Lieu of Writ of Habeas Corpus and Petition for Return of Child pursuant to the Convention and the International Child Abduction Remedies Act, it appears that **[REDACTED]** person under sixteen years of age, is illegally held in custody, confinement or restraint by Diana Lucia Montoya Alvarez at **[REDACTED]**. Therefore, there is an imminent likelihood that the Respondent would remove the child from the jurisdiction and a Warrant should issue in lieu of Writ of Habeas Corpus.

It is therefore, this ___ day of _____, 2010, **ORDERED**:

1. That a Warrant of Arrest issue out of and under the Seal of the United States District Court for the Southern District of New York directed to any peace officer within the State of New York commanding him to take into protective custody **[REDACTED]** and deliver ● to Social Services where ● shall remain in custody until a hearing is scheduled, said hearing to be done promptly.

2. That Respondent Diana Lucia Montoya Alvarez shall appear before this Court on the _____ day of _____, 2010 at _____ a.m./p.m. in the Courtroom _____ of the United States District Court for the Southern District of New York, White Plains Division, located at 300 Quarropas Street, White Plains, New York 10601, for a hearing on the merits of the Petition for Return of Child to Petitioner. The Respondent may appear with or without counsel.

3. That if the Respondent either fails to appear on the ____ day of _____, 2010 at

_____ a.m./p.m., or removes the child or causes the child to be removed from the jurisdiction of this Court, the Court shall issue a warrant for the arrest of the Respondent and require that the Respondent appear for a contempt hearing.

4. That a copy of this Order, a copy of the Petition for Warrant in Lieu of Habeas Corpus and Petition for Return of Child to Petitioner, together with all attachments, a copy of the Request for Return, and a Notice of Petition Under Hague Convention, shall be served forthwith upon the Respondent by the United States Marshal for the Southern District of New York.

5. That this Order gives any peace officer within the State of New York the authority to search the premises of **[REDACTED]** or any other place where **[REDACTED]** is reasonably believed to be present, for the purpose of determining whether **[REDACTED]** is present.

Dated: _____

_____

United States District Judge
United States District Court for the
Southern District of New York

Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
White Plains Division

Case No. ____

In re the Application of: Manuel Jose Lozano

Manuel Jose Lozano

Redacted

Petitioner,

vs.

Diana Lucia Montoya Alvarez

Redacted

Respondent.

SHOW CAUSE ORDER

The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct 1980, International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq.

Before the Court is the Petition for Issuance of Warrant in lieu of Writ of Habeas Corpus and Petition for Return of Child to Petitioner. This Order addresses only the Petitioner's request for an Order to Show Cause and makes no determination as to the merits of the Petition for Return of Children to Petitioner. Upon considering the Petition, the Convention and the International Child Abduction Remedies Act ("ICARA"), it is this ___ day of _____, 2010, **ORDERED:**

1. That Respondent Diana Lucia Montoya Alvarez is prohibited from removing the child **[REDACTED]** or causing the child to be removed from the jurisdiction of this Court pending final disposition of the above-captioned Petition.

2. That Respondent Diana Lucia Montoya Alvarez shall appear before this Court on the _____ day of _____, 2010 at _____ a.m./p.m. in the Courtroom _____ of the United States District Court for the Southern District of New York, White Plains Division, located at 300 Quarropas Street, White Plains, New York 10601, and shall appear at that time with the child **[REDACTED]** and with any and all passports and travel documents for the child and for the Respondent, for an initial hearing so that a date may be set for an expedited hearing on the merits of the Petition for the Return of the Child. The Respondent may appear with or without counsel.

3. That Respondent shall post a bond of $_____ with the Court, to remain in effect until further Order of this Court.

4. That if the Respondent either fails to appear on the ____ day of _____, 2010 at

_____ a.m./p.m., or removes the child or causes the child to be removed from the jurisdiction of this Court, the Court shall issue a warrant for the arrest of the Respondent and require that the Respondent appear for a contempt hearing.

5. That a copy of this Order, a copy of the Petition for Warrant in Lieu of Habeas Corpus and Petition for Return of Child to Petitioner, together with all attachments, a copy of the Request for Return, and a Notice of Petition Under Hague Convention, shall be served forthwith upon the Respondent by the United States Marshal for the Southern District of New York.

Dated: _____

_____
United States District Judge
United States District Court for the
Southern District of New York

Exhibit I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
White Plains Division

Case No. _____

In re the Application of: Manuel Jose Lozano

Manuel Jose Lozano

Redacted

Petitioner,

vs.

Diana Lucia Montoya Alvarez

Redacted

Respondent.

ORDER FOR FILING EMERGENCY PETITION FOR WARRANT IN LIEU OF WRIT OF HABEAS CORPUS AND PETITION FOR RETURN OF CHILD ALONG WITH EXHIBITS UNDER SEAL

To protect the identity and whereabouts of the child at issue in the above-referenced matter, it is hereby ORDERED that Petitioner's request to file

under seal the Emergency Petition for Warrant in lieu of Writ of Habeas Corpus and Petition for Return of Child to Petitioner, along with all exhibits, is GRANTED.

Dated: _____

_____

United States District Judge
United States District Court for the
Southern District of New York

[Letterhead of Cravath Swaine & Moore LLP]

(212) 474-1604

January 10, 2011

In re the Application of Manuel Jose Lozano
Case No. 10-CV-8485

Dear Judge Karas:

We request permission to file under seal the enclosed unredacted version of Respondent Diana Lucia Montoya Alvarez's Memorandum of Law in Opposition to Petition for Return of Child to Petitioner (the "Opposition Memorandum"). We believe that the Opposition Memorandum contains sensitive personal information relating to the Respondent or her minor child, and we request that such information not be made available to the public.

As reflected in this Court's November 16, 2010 Order, this litigation involves discussion of sensitive private information regarding Respondent and her minor child. When determining whether to seal a document, the presumption in favor of public access to judicial documents must be balanced against countervailing privacy interests. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). The Second Circuit has held that subject matter that is traditionally private, such as "family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public". *Id.* at 1051. There is also a recognized privacy

interest in medical records, treatment and diagnosis. *See Unites States v. Sattar*, 471 F. Supp. 2d 380, 387 & n.4 (S.D.N.Y. 2006). Furthermore, the privacy interests of innocent third parties also weigh heavily in a court's analysis. *Gardner v. Newsday, Inc.*, 895 F.3d 74, 79-80 (2d Cir. 1990). Because the Opposition Memorandum contains descriptions of Respondent's personal family affairs, and details concerning her minor child, an innocent third party, including the child's mental health, we request that the Court permit us to file the unredacted version of the document under seal.

In the alternative, we request permission to file a redacted version of the Opposition Memorandum that redacts not only Respondent's address and information identifying her minor child, per this Court's November 16, 2010 Order, but also any information that could be used to identify Respondent's location, either directly or indirectly; any medical information relating to the Respondent or her minor child, including discussion of their mental health; and any specifics relating to the nature of the relationship between the named parties.

We have filed electronically a fully redacted version of the Opposition Memorandum. We have also served opposing counsel with both the fully redacted and unredacted versions of the Opposition Memorandum. Additionally, enclosed are courtesy copies of the fully redacted and unredacted versions of the Opposition Memorandum.

The parties are also currently negotiating an Agreed Confidentiality Order to govern the above-

captioned action, which the parties will then present to the Court. It will set forth a procedure for the use of sensitive personal information in future court filings.

We are happy to answer any questions or discuss this matter further at the Court's convenience.

Respectfully

/s/ Elizabeth L. Grayer
Elizabeth L. Grayer

Honorable Kenneth M. Karas
United States District Court
Southern District of New York
United States Courthouse
300 Quarropas Street
Chambers 533
White Plains, NY 10601-4150

Respondent is to submit a new, proposed redacted version of her Opposing Memorandum. What may be redacted from this Memorandum is: (i) information that could identify the child, (ii) information that could identify Respondent's location, either directly or indirectly, and (iii) privileged medical and mental health information. This redacted version is to be submitted to the Court for in camera review by January 24, 2011.

SO ORDERED.
/s/ KMK 1/10/11

Copy w/encls. to:

Amos W. Barclay, Esq.
Sharon M. Mills, Esq.
Shawn Patrick Regan, Esq.
Hunton & Williams, LLP
200 Park Avenue, 52nd Floor
New York, NY 10166

BY HAND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10-CV-8485 (KMK)
ECF CASE

In re the Application of Manuel Jose Lozano

MANUEL JOSE LOZANO,
Petitioner,

vs.

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

[redacted]

AGREED SCHEDULING ORDER

Upon the undersigned consent of the parties hereto, it is hereby ORDERED that the following schedule shall govern proceedings in this action.

EVENT	DATE
Deadline for service of expert report by Respondent.	January 5, 2011
Deadline for filing Memorandum of Law in Opposition to the Petition by Respondent.	January 7, 2011
Deadline for service of rebuttal expert report by Petitioner.	January 26, 2011

It is further ORDERED that the hearing shall commence on February 2, 2011, at 10 a.m.

It is further ORDERED that five (5) business days after the close of the hearing, the parties shall file post-hearing briefs.

Dated: December 3, 2010
White Plains, New York

SO ORDERED.

/s/ Kenneth M. Karas
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

Consented to:

HUNTON & WILLIAMS LLP,

By /s/ Sharon M. Mills
Amos W. Barclay, Esq.
Sharon M. Mills, Esq.
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Attorneys for Petitioner

CRAVATH, SWAINE & MOORE, LLP,

By /s/ Etienne Barg-Townsend
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Attorneys for Respondent

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 24, 2013

Mr. Shawn Patrick Regan
Hunton & Williams LLP
200 Park Avenue, 52nd Floor
New York, NY 10166

Re: Manuel Jose Lozano
v. Diana Lucia Montoya Alvarez
No. 12-820

Dear Mr. Regan:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

Sincerely,

/s/ William K. Suter
William K. Suter. Clerk

Explanatory Report by Elisa Pérez-Vera

Introduction

I *Results of the work of the Hague Conference on private international law*

1 The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on private international law in Plenary Session, and by unanimous vote of the States which were present.[1] On 25 October 1980, the delegates signed the Final Act of the Fourteenth Session which contained the text of the Convention and a Recommendation containing the model form which is to be used in applications for the return of children who have been wrongfully abducted or retained.

On this occasion, the Hague Conference departed from its usual practice, draft Conventions adopted during the Fourteenth Session being made available for signature by States immediately after the Closing Session. Four States signed the

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[1] Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela and Yugoslavia. Representatives of the Arab Republic of Egypt, Israel and Italy did not participate in the vote, despite having played an active part in the proceedings of the First Commission. Morocco, the Holy See and the Union of the Soviet Socialist Republics sent observers. In the course of the proceedings, the First Commission also had at its disposal the invaluable assistance of observers from the Council of Europe, the Commonwealth Secretariat and International Social Service.

Convention then (Canada, France, Greece and Switzerland), which thus bears the date 25 October 1980.

2 As regards the starting point of the proceedings which resulted in the adoption of the Convention, as well as the matter of existing conventions on the subject or those directly related to it, we shall refer to the introduction to the Report of the Special Commission.[2]

3 The Fourteenth Session of the Conference, which took place between 6 and 25 October 1980, entrusted the task of preparing the Convention to its First Commission, the Chairman of which was Professor A. E. Anton (United Kingdom) and the Vice-Chairman Dean Leal (Canada), who had already been Chairman and Vice-Chairman respectively of the Special Commission. Professor Elisa Pérez-Vera was confirmed in her position as Reporter. Mr Adair Dyer, First Secretary of the Permanent Bureau, who had prepared important documents for the Conference proceedings, was in charge of the scientific work of the secretariat.

4 In the course of thirteen sittings, the First Commission gave a first reading to the Preliminary Draft drawn up by the Special Commission. At the same time, it named the members of a Drafting Committee which drafted the text concurrently with the progress of the main proceedings.[3] Seven other sittings were

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[2] Report of the Special Commission, Nos 3 and 1 to 15.

[3] The Drafting Committee, under the chairmanship of Mr Leal as Vice-Chairman of the First Commission, included Messrs Savolainen (Finland), Chatin (France), Jones (United

devoted to a discussion of the text prepared by the Drafting Committee,[4] as well as of clauses relating to the application of the Convention to States with non-unified legal systems ('Application Clauses') and of the model form[5] drafted by *ad hoc* Committees.[6] The final clauses had been suggested by the Permanent Bureau and were incorporated into the preliminary draft Convention drawn up by the Drafting Committee.

II *Aim and structure of this Report*

5 The Explanatory Report on a text which is destined to become positive law, that is to say a text which will require to be cited and applied, must fulfil at least two essential aims. On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the

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Kingdom) and the Reporter. Mr Dyer and several recording secretaries provided the Committee with extremely valuable assistance.

[4] Working Documents Nos 45, 66, 75, 78, 79 and 83.

[5] Working Document No 59, supplemented by the proposal of the Secretariat in Working Document No. 71. The Subcommittee on 'Application Clauses' decided against changing the terms of the articles on this topic which had been prepared by the Special Commission (*Procès-verbal* No 12).

[6] The 'Model Forms' Subcommittee, under the chairmanship of Professor Müller-Freienfels (Federal Republic of Germany) comprised Messrs Deschenaux (Switzerland), Hergen (United States), Barbosa (Portugal), Minami (Japan) and Miss Pripp (Sweden). The Subcommittee on 'Application Clauses', chaired by Mr van Boeschoten (Netherlands), was made up of Messrs Hétu (Canada), Hjorth (Denmark), Creswell (Australia), Salem (Egypt) and Miss Selby (United States).

Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options. It is certainly not necessary to take exhaustive account of the various attitudes adopted throughout the period during which the Convention was being drawn up, but the point of view reflected in the Convention will sometimes be more easily grasped by being set opposite other ideas which were put forward.

Now, given the fact that the preliminary draft Convention prepared by the Special Commission enjoyed widespread support[7] and that the final text essentially preserves the structure and fundamental principles of the Preliminary Draft, this final Report and in particular its first part, repeats certain passages in the Report of the Special Commission prepared in April 1980, for the Fourteenth Session.[8]

6 This final Report must also fulfil another purpose, *viz.* to supply those who have to apply the Convention with a detailed commentary on its provisions. Since this commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

7 We can conclude from the foregoing considerations that these two objectives must be clearly distinguished and that even the methods of

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[7] See in particular the *Observations of Governments*, Prel. Doc. No 7.

[8] Prel. Doc. No 6.

analysis used cannot be the same for each of them. Nevertheless, the need to refer in both cases to the one text, that of the Convention, implies that a certain amount of repetition will be necessary and indeed inevitable. Despite this risk and in view of the emphasis which is placed on a double objective, the Report has been divided into two parts, the first being devoted to a study of the general principles underlying the Convention, the second containing an examination of the text, article by article.

8 Finally, as Professor von Overbeck emphasized in 1977,[9] it would be as well to remember that this Report was prepared at the end of the Fourteenth Session, from the *procès-verbaux* and the Reporter's notes. Thus it has not been approved by the Conference, and it is possible that, despite the Rapporter's efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.

First Part—General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships

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[9] Explanatory Report on the Convention on the Law Applicable to Matrimonial Property Regimes, *Acts and Documents of the Thirteenth Session*, Book II. p. 329.

which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the rule requiring the prompt return of children who have been wrongfully removed or retained.

A *Definition of the Convention's subject-matter*

11 With regard to the definition of the Convention's subject-matter,[10] we need only

[10] See in particular the *Questionnaire and Report on international child abduction by one parent*, prepared by Mr Adair Dyer, Prel. Doc. No 1, August 1977, *supra*, pp. 18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No 6, May 1980, *supra*, pp. 172-173.

remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals—together with all the drama implicit in the fact that it is concerned with the protection of children in international relations—derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b*, 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as

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[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping*, prepared by the Permanent Bureau. Prel. Doc. No 5, June 1979. *supra*, pp. 163-164.

one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken—in which case the violated custody rights were exercised *ex lege*—as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.[12]

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past

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[12] Dyer Report, *supra*. pp. 22-23.

often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignor the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as

follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs'.[13]

In fact, as Mr Dyer has emphasized, in the literature devoted to a study of this problem, 'the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives'.[14]

25 It is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate

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[13] Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child.* Text adopted on 4 October 1979.

[14] Dyer Report, *supra*, p. 21.

reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other

alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

D *Exceptions to the duty to secure the prompt return of children*

27 Since the return of the child is to some extent the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty. It is not of course necessary to examine in detail the provisions which constitute these exceptions, but merely to sketch their role in outline, while at the same time stressing in particular the reasons for their inclusion in the Convention. From this vantage point can be seen those exceptions which derive their justification from three different principles.

28 On the one hand, article 13*a* accepts that the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual

exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.

29 On the other hand, paragraphs 1*b* and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

30 In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the

age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.

31 Thirdly, there is no obligation to return a child when, in terms of article 20, its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define. Although we shall refer to the commentary on article 20 for the purpose of defining such scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a 'public policy' clause.

The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula

concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed'.[15] The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. That is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32 The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision

15 See *P.-v.* No 9 and associated Working Documents.

either to 'evaluate' the right claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33 In this situation, the adoption by a comforting majority[16] of the formula which appears in article 20 of the Convention represents à laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the one hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested.

34 To conclude our consideration of the problems with which this paragraph deals, it

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[16] The text was adopted with 14 votes in favour, 6 against and 4 abstentions, see *P.-v.* No 13.

would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

II NATURE OF THE CONVENTION

A *A convention of co-operation among authorities*

35 By defining the ends pursued by the Contracting States, a convention's objects in the final analysis determine its nature. Thus, the Convention on the Civil Aspects of International Child Abduction is above all a convention which

seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States. Such collaboration has a bearing on the two objects just examined, *viz.* on the one hand, obtaining the prompt return of the child to the environment from which it was removed, and on the other hand the effective respect for rights of custody and access which exist in one of the Contracting States.

36 This description of the Convention can also be drawn in a negative way. Thus, it can be said at the outset that the Convention is not concerned with the law applicable to the custody of children. In fact, the references to the law of the State of the child's habitual residence are of limited significance, since the law in question is taken into consideration only so as to establish the wrongful nature of the removal (see, for example, article 3). Secondly, the Convention is certainly not a treaty on the recognition and enforcement of decisions on custody. This option, which gave rise to lengthy debates during the first meeting of the Special Commission, was deliberately rejected. Due to the substantive consequences which flow from the recognition of a foreign judgment, such a treaty is ordinarily hedged around by guarantees and exceptions which can prolong the proceedings. Now, where the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay.

37 Once it is accepted that we are dealing with a convention which is centred upon the idea of co-operation amongst authorities, it must also be made clear that it is designed to regulate only those situations that come within its scope and which involve two or more Contracting States. Indeed, the idea of a 'universalist' convention (*i.e.* a convention which applies in every international case) is difficult to sustain outwith the realm of conventions on applicable law. In this regard, we must remember that the systems which have been designed either to return children or to secure the actual exercise of access rights, depend largely on cooperation among the Central Authorities, a co-operation which itself rests upon the notion of reciprocal rights and duties. In the same way, when individuals, by invoking the provisions of the Convention, apply directly to the judicial or administrative authorities of a Contracting State, the applicability of the Convention's benefits will itself depend on the concept of reciprocity which in principle excludes its being extended to nationals of third countries.

What is more, although the Convention attains its objectives in full only as among the Contracting States, the authorities in each of those States have the absolute right to be guided by the provisions of the Convention when dealing with other, similar situations.

B *The autonomous nature of the Convention*

38 The Convention, centred as it is upon the notion of co-operation among authorities with a view to attaining its stated objects, is autonomous

as regards existing conventions concerning the protection of minors or custody rights. Thus, one of the first decisions taken by the Special Commission was to direct its proceedings towards the drawing up of an independent Convention, rather than the preparation of a protocol to the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable to the protection of minors*. Seen from this perspective, the Convention could not possibly be confined within the framework provided by the conventions on the recognition and enforcement of custody decisions, including that of the Council of Europe Convention.[17]

39 This autonomous character does not mean that the provisions purport to regulate all the problems arising out of international child abductions. On the contrary, to the extent that the Convention's aims, although ambitious, are given concrete expression, the basic problem of custody rights is not to be found within the scope of the Convention. The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees, quite apart from the fact that such rules are derived from internal law or from treaty provisions.

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[17] The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, adopted by the Committee at Ministers of the Council of Europe on 30 November 1979 and opened for signing by the Member States at Luxemburg on 20 May 1980.

On the other hand, even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child wrongfully removed or retained, or to organize access rights (article 34).

C *Relations with other conventions*

40 The Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child. In as much as it does not seek to decide upon the merits of the rights of parties, its compatibility with other conventions must be considered. Nonetheless, such compatibility can be achieved only by ensuring that priority is given to those provisions which are likely to bring about a speedy and, to some extent, temporary solution. In fact it is only after the return of the child to its habitual residence that questions of custody rights will arise before the competent tribunals. On this point, article 34 states that 'This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions.' Moreover, since one is trying to avoid delays in the application of the Convention's provisions caused by claims concerning the merits

of custody rights, the principle in article 34 ought to be extended to any provision which has a bearing upon custody rights, whatever the reason. On the other hand, as has just been emphasized in the preceding paragraph, the parties may have recourse to any rule which promotes the realization of the Convention's aims.

D *Opening of the Convention to States not Members of the Hague Conference*

41 On this point also, by virtue of the decision that it be of a 'semi-open' type, the Convention is shown to be one of co-operation. In principle, any State can accede to the Convention, but its accession 'will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession' (article 38). The Contracting States, by this means, sought to maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence.

What is more, the choice of a system based on the express acceptance of accession by each Member State, by which such acceptance becomes effective as amongst themselves,[18] in preference to a more open system by which accession has effect except as regards Member States which raise objections

[18] As in article 39 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, see *P.-v.* No 13.

thereto within a certain period of time,[19] demonstrates the importance which the States attached to the selection of their co-signatories in those questions which form the subject- matter of the Convention.

III INSTRUMENTS FOR APPLYING THE CONVENTION

A *The Central Authorities*

42 A convention based on co-operation such as the one which concerns us here can in theory point in two different directions; it can impose direct co-operation among competent internal authorities, in the sphere of the Convention's application, or it can act through the creation of Central Authorities in each Contracting State, so as to coordinate and 'channel' the desired co-operation. The Preliminary Draft drawn up by the Special Commission expressed quite clearly the choice made in favour of the second option, and the Convention itself was also built in large measure upon the intervention and powers of Central Authorities.

43 Nevertheless, the unequivocal acceptance of the possibility for individuals to apply directly to the judicial or administrative authorities which have power to apply the provisions of the Convention (article 29), increases the importance of the duty of co-operation laid upon them, so much so that the system adopted by the

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[19] The system adopted, among others, by the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

Convention could be characterized as a 'mixed system', due to the fact that, aside from the duties imposed upon the Central Authorities, it creates other obligations which are peculiar to judicial or administrative authorities.

44 What is more, it would be a mistake to claim to have constructed a convention to counter international child abduction without taking account of the important role played by the internal judicial or administrative authorities in all matters concerning the protection of minors. In this context, references to administrative authorities must be understood as a simple reflection of the fact that, in certain Member States, the task in question is entrusted to such authorities, while in the majority of legal systems jurisdiction belongs to the judicial authorities. *In fine*, it is for the appropriate authorities within each State to decide questions of custody and protection of minors; it is to them that the Convention has entrusted the responsibility of solving the problems which arise, whether they involve the return of a child wrongfully removed or retained or organizing the exercise of access rights. Thus, the Convention adopts the demand for legal certainty which inspires all internal laws in this regard. In fact, although decisions concerning the return of children in no way prejudge the merits of any custody issue (see article 19), they will in large measure influence children's lives; such decisions and such responsibilities necessarily belong ultimately to the authorities which ordinarily have jurisdiction according to internal law.

45 However, the application of the Convention, both in its broad outline and in the great majority of cases, will depend on the working of the instruments which were brought into being for this purpose, *i.e.* the Central Authorities. So far as their regulation by the Convention is concerned, the first point to be made is that the Conference was aware of the profound differences which existed as regards the internal organization of the Contracting States. That is why the Convention does not define the structure and capacity to act of the Central Authorities, both of which are necessarily governed by the internal law of each Contracting State. Acceptance of this premise is shown in the Convention by its recognition of the fact that the tasks specifically assigned to Central Authorities can be performed either by themselves, or with the assistance of intermediaries (article 7). For example, it is clear that discovering a child's whereabouts may require the intervention of the police; similarly, the adoption of provisional measures or the institution of legal proceedings concerning private relationships may fall outwith the scope of those powers which can be devolved upon administrative authorities in terms of some internal laws. Nonetheless, the Central Authority in every case remains the repository of those duties which the Convention imposes upon it, to the extent of its being the 'engine' for the desired co-operation which is designed to counter the wrongful removal of children. On the other hand, it is so as to take account of the peculiarities of different legal systems that the Convention allows a Central Authority to require that applications

addressed to it be accompanied by a 'written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act' (article 28).

46 In other respects, the Convention follows a long-established tradition of the Hague Conference,[20] by providing that States with more than one system of law or which have autonomous territorial organizations, as well as Federal States, are free to appoint more than one Central Authority. However, the problems encountered in the practical application of those Conventions which provide for several Central Authorities within the territory of a single State, as well as, in particular, the special characteristics of the subject matter of this Convention, led the Conference to adopt the text previously established by the Special Commission and take a step towards creating a sort of 'hierarchy' of Central Authorities in those States. In fact, by confining our discussion to the latter point, we can see that if the person responsible for the removal or retention of a child avails himself of the excellent means of communication within a particular State, the applicant or Central Authority of the requesting State could be forced to re-apply several times in order to obtain the return of the child. Moreover, it is still possible that, even if there are valid reasons for believing

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[20] Compare. for example. article 18(3) of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* Also, articles 24 and 25 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*

that the child is in a Contracting State, the territorial unit of the child's residence will be ignored.

47 The Convention supplies a solution to these and other situations by providing that States which establish more than one Central Authority should at the same time designate 'the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State' (article 6). The matter is important, because the Convention imposes a time-limit upon the duty of judicial or administrative authorities in the requested State for the prompt return of the child;[21] a mistaken choice as to the requested Central Authority could therefore have decisive consequences for the claims of the parties. Now, so as to prevent a factor which was not provided for in the Convention modifying the Convention's normal application, this type of 'super-Central Authority' envisaged in article 6 will have to adopt a positive approach. As a matter of fact, if it is to act as a bridge between on the one hand the Central Authority of its own State which has jurisdiction in each particular case, and on the other hand the Central Authorities of the other Contracting States, it will find itself obliged to choose between proceeding to locate a child in order to transmit the matter to the appropriate Central Authority, and transmitting a copy of the application to all the Central Authorities of the State concerned, which would inevitably cause a great increase in

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[21] *Cf.infra*, the commentary on article 12 of the Convention.

administrative duties. However it is undoubtedly the case that such a Central Authority will play a fundamental role in the application of the Convention in regard to relations affecting the aforementioned States.

B *The model form*

48 Following the decision taken by the Special Commission at its second meeting, the Fourteenth Session of the Conference adopted simultaneously with its adoption of the Convention, a Recommendation containing a model form for applications for the return of children wrongfully removed or retained. Two comments are appropriate here. The first concerns the legal force of this Recommendation. In drawing it up, it seemed advisable to have recourse to the general law governing international organizations. Now, viewed from this perspective, a recommendation is in substance a non-obligatory invitation addressed by one international organization to one, several or all Member States. Consequently, States are not strictly required to make use of the model form contained in the Recommendation; indeed, the Commission took care to avoid presenting the form as an annex to the Convention.

The reasons for this are clear. Most importantly, given the lack of prior international experience in this field, it can well be imagined that, after a number of years, the practical application of the Convention's provisions will result in certain modifications to the present form being thought advisable. Now, it seems better not to subject future revisions of the text to the formalities

required by public international law for the revision of international treaties. Besides, it could be said, in connection with any future concerted action by the Conference in this regard, that adaptation of the form which was recommended to States should also be a matter for bilateral negotiations between Central Authorities, in implementation of their general obligation contained in article 7(2)(i).

On the other hand, a direct consequence of the decision not to make the use of the model form obligatory is the catalogue of details which every application to a Central Authority must contain (article 8).

49 The second comment bears upon the sphere of application and the terms of the recommended form. Although the Convention also governs important matters concerning access rights, the model form proposed is merely a model application for the return of the child. This demonstrates the concentration of interest within the Conference on the resolution of problems arising out of the removal of a child, whilst at the same time throwing into relief the novelty of the means chosen to resolve them. It is precisely because the means are new that it was thought advisable to include some indication of the way in which they should be used.

50 The actual terms of the form narrate precisely those points required by the Convention itself. We should however like to draw attention to two minor points. Firstly, the phrase 'date and place of marriage' of the parents of the child in question: in as much as it is not followed, in

parentheses, by the words 'if any', it would seem to treat natural children in an exceptional and discriminatory fashion. Moreover, the absence of the same phrase alongside the reference to the date and place of birth of the child compares badly with the precision shown by article 8 of the Convention which adds, referring to the date of birth, the words 'where available'.

51 Secondly, there is an inconsistency between the French and English texts regarding the 'information concerning the person alleged to have removed or retained the child'. It would be advisable to follow the English text here, since it is more comprehensive, especially as regards its reference to the nationality of the alleged abductor, a fact which will sometimes prove decisive in efforts to locate the child.

IV STRUCTURE AND TERMINOLOGY

A *The structure of the Convention*

52 Articles 1, 2, 3 and 5 define the Convention's scope with regard to its subject-matter, by specifying its aims and the criteria by which the removal or retention of a child can be regarded as wrongful. Article 4 concerns the persons to whom the Convention applies, while article 35 determines its temporal application. Articles 6 and 7 are devoted to the creation of the Central Authorities and their duties. Articles 8, 27 and 28 are concerned with applications to Central Authorities and the documents which may accompany or supplement an application to them. Articles 9 to 12, and 14 to 19, deal with the various means established for bringing about the

return of a child, as well as the legal significance of a decree to that effect. Articles 13 and 20 concern the exceptions to the general rule for the return of the child. Article 21 lays down the specific duties which the States have taken upon themselves with regard to access rights.

Articles 22 to 26 and 30 (like the aforementioned articles 27 and 28) deal with certain technical matters regarding proceedings and the costs which can result from applications submitted pursuant to the provisions of the Convention. Articles 29 and 36 reflect the 'non-exclusive' view which prevailed during the preparation of the Convention in stating, on the one hand, that applications may be submitted directly by individuals to the judicial or administrative authorities of the Contracting States, outwith the framework of the provisions of the Convention, and on the other hand that Contracting States have the acknowledged right to derogate by agreement from the restrictions which the present Convention allows to be imposed upon the return of the child. Articles 31 to 34 refer to States with more than one system of law and to the Convention's relations with other conventions. Lastly, articles 37 to 45 contain the Final Clauses.

B *Terminology used in the Convention*

53 Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms, with the exception of those in article 5 concerning custody and access rights, where it was absolutely necessary to establish the scope of the Convention's subject-matter. These

will be examined in their context. At this point we wish merely to consider one aspect of the terminology used which in our opinion merits a brief comment. It has to do with lack of correspondence between the title of the Convention and the terms used in the text. Whilst the former uses the phrase 'international child abduction', the provisions of the Convention avail themselves of circumlocutions or at any event of less evocative turns of phrase, such as 'removal' or 'retention'. The reason for this is quite in keeping with the Convention's limited scope. As was stressed above (see Nos 12 to 16), studies of the topic with which the Convention deals show clearly that, with regard both to the relationship which normally exists between 'abductor' and 'child' and to the intentions of the former, we are far removed from the offences associated with the terms 'kidnapping', *'enlèvement'* or *'secuestro'*. Since one is far removed from problems peculiar to the criminal law, the use in the text of the Convention of possibly ambiguous terms was avoided.

On the other hand, it was felt desirable to keep the term 'abduction' in the title of the Convention, owing to its habitual use by the 'mass media' and its resonance in the public mind. Nonetheless, so as to avoid any ambiguity, the same title, as in the Preliminary Draft, states clearly that the Convention only aims to regulate the 'civil aspects' of this particular phenomenon. If, in the course of this Report, expressions such as 'abduction' or 'abductor' are used from time to time, and one will find them also in the model form, that is because

they sometimes permit of easier drafting; but at all events, they will have to be understood to contain nuances which their application to the specific problem with which the Convention deals may call for.

Second Part—Commentary on the specific articles of the Convention

CHAPTER ONE—SCOPE OF THE CONVENTION

54 The first chapter defines the scope of the Convention as regards its subject-matter and the persons concerned (its scope *ratione materiae* and *ratione personae*). However, so as to have an overall picture of the Convention's scope, one must consider also article 34 which deals with the Convention's relationship with other conventions, article 35 which concerns the Convention's temporal application, and articles 31 to 33 which relate to the application of the Convention in States with more than one legal system.

Article 1—The aims of the Convention

a General observations

55 This article sets out in two paragraphs the objects of the Convention which were discussed in broad terms in the first part of this Report. It is therefore clear that the lack of correspondence between the title and the specific provisions of the Convention is more than merely a matter of terminology.[22] In any event, it must be realized

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[22] See the Report of the Special Commission. No 52.

that the terms used in the title, while lacking legal exactitude, possess an evocative power and force which attract attention, and this is essential.

56 As for the nature of the matters regulated by the Convention, one general comment is required. Although the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles. Now, in the present case, the international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with can therefore come within the scope of the Convention through, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives. On the other hand, the fact that the persons concerned hold different nationality does not necessarily mean that the international type of case to which the Convention applies automatically will arise, although it would clearly indicate the possibility of its becoming 'international' in the sense described.

b *Sub-paragraph a*

57 The aim of ensuring the prompt return of children wrongfully removed or retained has already been dealt with at length. Besides, the Fourteenth Session in no way altered the literal meaning of the wording devised by the Special Commission. Thus only two brief points by way of

explanation will be put forward here. The first concerns the characterization of the behaviour which the realization of this objective seeks to prevent. To sum up, as we know, the conduct concerned is that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation. In this context, the reference to children 'wrongfully retained' is meant to cover those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying. This is the typical situation which comes about when the removal of the child results from the wrongful exercise of access rights.

58 Secondly, the text states clearly that the children whose return it is sought to secure are those who have been removed to, or retained in, 'any Contracting State'. This wording is doubly significant. On the one hand, the provision in article 4 limits the scope of the Convention *ratione personae* to those children who, while being habitually resident in one of the Contracting States, are removed to or retained in, the territory of another Contracting State.

59 But these same words also have a quite diferent meaning. In fact, through this formulation this particular object of the Convention, whether considered in its own right or in relation to article 2, becomes indirectly a general one, applicable to all children who, in the circumstances set forth, are in any Contracting

State. However, there will always be a difference between the legal position of those children who, prior to their removal, were habitually resident in another Contracting State, and that of other children. The position of the former will have to be resolved by the direct application of the provisions of the Convention. On the other hand, the duty of States towards the other children is less clear (leaving aside provisions of internal law) in so far as it derives from the obligation stated in article 2, which could be described as a duty to take appropriate measures to prevent their territory being turned into a place of refuge for potential 'abductors'.

c *Sub-paragraph* b

60 The aim of the Convention contained in this sub-paragraph was clarified in the course of drafting at the Fourteenth Session.[23] So far as its scope is concerned, it is now clear that the situations under consideration are the same as those to which the Convention applies, that is to say international situations which involve two or more Contracting States. It should not be thought that precision in this matter is unnecessary, especially when one considers that the text of the Preliminary Draft allowed of other interpretations, and in particular a reference to internal situations.

61 As for knowing the desired meaning of the aim stated therein, it is necessary to draw a distinction between custody rights and access

[23] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and *P.-v.* No 2.

rights. With regard to custody rights, it can be said that the Convention has not attempted to deal with them separately. It is thus within the general obligation stated in article 2, and the regulation governing the return of the child—which is based, as we shall see in the commentary on article 3, upon respect for custody rights actually exercised and attributed under the law of the child's habitual residence—that one must look in order to find the consequences of the provision which concerns us here. On the other hand, access rights are treated more favourably, and the foundations upon which respect for their effective exercise seem fixed, at least in broad outline, within the context of article 21.

Article 2—General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth a general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Contracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall

within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law.

Article 3—The unlawful nature of a removal or retention

a General observations

64 Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the

return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the *status quo* to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

b The juridical element

65 As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, *i.e.* by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such

situations could not be put in the same category as the wrongful removals which it is sought to prevent.[24]

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

66 The second question which should be examined concerns the law which is chosen to govern the initial validity of the claim. We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile. Moreover, the choice of the law of habitual residence as the factor which is to determine the lawfulness of the situation flouted by the abduction is logical. In actual fact, to the arguments in favour of its being accorded a pre-eminent role in the protection of minors, as in the Hague Convention of 1961, must be added the very nature of the Convention itself, *viz.* its

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[24] *Cf.* Working Document No 5 (Proposal of the Canadian delegation) and *P.-v.* No 3.

limited scope. In this regard, two points must be made: on the one hand, the Convention does not seek to govern definitively questions concerning the custody of children, a fact which weakens considerably those arguments favouring the application of national law; on the other hand, the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody.

From a different viewpoint, our attention should also be drawn to the fact that the Convention speaks of the 'law' of the State of habitual residence, thus breaking with a long-established tradition of Hague Conventions on applicable law since 1955, which refer to a particular internal law to govern the matters with which they deal. Of course, in such cases, the word 'law' has to be understood in its widest sense, as embracing both written and customary rules of law—whatever their relative importance might be—and the interpretations placed upon them by case-law. However, the adjective 'internal' implies the exclusion of all reference to the conflict of law rules of the particular legal system. Therefore, since the Convention has abandoned its traditional formulation by speaking of 'the law of the habitual residence', this difference cannot be regarded as just a matter of terminology. In fact, as the preliminary proceedings of the Commission demonstrate,[25] it was intended right from the

[25] *Cf.* the Special Commission Report. No 62. *supra*. p. 90.

start to expand considerably the range of provisions which have to be considered in this context. Actually, a proposal was made during the Fourteenth Session that this article should make it clear that the reference to the law of the habitual residence extends also to the rules of private international law. The fact that this proposal was rejected was due to the Conference's view that its inclusion was unnecessary and became implicit anyway once the text neither directly nor indirectly excluded the rules in question.[26]

67 The foregoing considerations show that the law of the child's habitual residence is invoked in the widest possible sense. Likewise, the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of article 3 takes into consideration some—no doubt the most important—of those sources, while emphasizing that the list is not exhaustive. This paragraph provides that 'the rights of custody mentioned in sub-paragraph a above may arise in particular', thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. Now, as we shall see in the following paragraphs, these sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms

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[26] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation), and *P.-v.* No 2.

used, which allows the greatest possible number of cases to be brought into consideration.

68 The first source referred to in article 3 is law, where it is stated that custody 'may arise . . . by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child. In this respect, by including such cases within its scope, the Convention has taken a significant step towards resolving the real problems which in the past largely escaped the control of the traditional mechanisms of private international law.

As for knowing the legal system which, according to the Convention, is to attribute the custody rights, which it is desired to protect, it is necessary to go back to the considerations developed in the previous paragraph. Thus, custody *ex lege* can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that State. The scope of the first option is quite clear; the second implies, for example, that the removal by its French father of a child born out of

wedlock which had its habitual residence in Spain where it lived with its mother, both mother and child being of French nationality, should be considered wrongful in the Convention sense, by means of the application of French law designated as applicable by the Spanish conflict rule on questions of custody, quite independently of the fact that application of internal Spanish law would probably have led to a different result.

69 The second source of custody rights contained in article 3 is a judicial or administrative decision. Since the Convention does not expand upon this, it must be deemed, on the one hand, that the word 'decision' is used in its widest sense, and embraces any decision or part of a decision (judicial or administrative) on a child's custody and, on the other hand, that these decisions may have been issued by the courts of the State of the child's habitual residence as well as by the courts of a third country.[27] Now, in the latter case, that is to say when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.* that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by

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[27] This interpretation is based upon the deliberations of the Special Commission which led to its adopting a similar text to the current one. See Report of the Special Commission, No 64, *supra*. pp. 191-192.

which it may be confirmed or recognized.[28] This wide interpretation is moreover confirmed by the whole tenor of article 14.

70 Lastly, custody rights may arise according to article 3, 'by reason of an agreement having legal effect under the law of that State'. In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law', as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such à law and which may provide a basis for presenting a legal claim to the competent authorities. Now, to go back to the wide interpretation given by article 3 to the notion of the law of the State of the child's habitual residence', the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules. It is for the authorities of the State concerned to

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[28] See Working Document No 58. '*Document de clarification présenté par la délégation italienne*' for the desirability of including such a case in the Convention.

choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would recognize that custody had actually been exercised. On the other hand, the Convention does not state, in substance or form, the conditions which these agreements must fulfil, since these will change according to the terms of the law concerned.

71 Leaving aside a consideration of those persons who can hold rights of custody, until the commentary on article 4 which concerns the scope of the Convention *ratione personae*, it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised. Actually. in terms of article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law. Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of

the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent à later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

c The factual element

72 The second element characterizing those relationships protected by the Convention is that the custody rights which it is claimed have been breached by the child's removal were actually exercised by the holder. In fact, as soon as an approach to the subject-matter of the Convention was adopted which deviated from the pure and simple international recognition of custody rights attributed to parents, the Convention put its emphasis on protecting the right of children to have the stability which is so vital to them respected. In other words, the Convention protects the right of children not to have the emotional, social etc. aspects of their lives altered, unless legal arguments exist which would guarantee their stability in a new situation. This approach is reflected in the scope of the Convention, which is limited to custody rights actually exercised. What is more, such a notion is justified within the

framework of international relations by a complementary argument which concerns the fact that contradictory decisions arise quite frequently in this particular context, decisions which are basically of little use in protecting the stability of a child's life.

73 Actually, this idea was not opposed to any extent. However, several proposals[29] were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the 'abductor' this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in

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[29] *Cf.* Working Documents Nos 1 (Proposal of the United States delegation) and 10 (Proposal of the Finnish delegation). and also *P.-v.* No 3.

sub-paragraph *c*, 'the grounds on which the applicant's claim for return of the child is based', amongst the facts which it requires to be contained in applications to the Central Authorities.

On the other hand, article 13 of the Convention (12 in the Preliminary Draft) shows us the real extent of the burden of proof placed upon the 'abductor'; it is for him to show, if he wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the 'abductor' if he wishes to prevent the return of the child).

74 However, there is expressly included amongst the matters which the Convention is intended to protect the situation which arises when actual custody cannot be exercised precisely because of the removal of the child; that is the situation envisaged in the last alternative set out in article 3*b*. Theoretically, the underlying idea is perfectly in keeping with the spirit of the Convention, and it is therefore from a practical point of view that it may be wondered whether such a provision needed to be added.[30] From this

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30 *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation)and the debate on this point in *P.-v.* Nos 3 and 13.

viewpoint, the hypothetical situations which this provision is designed to protect are of two types, one of which falls clearly within the scope of the Convention, while the other, failing this rule, would probably require too strained an interpretation of its provisions. On the one hand there are cases where an initial decision on custody is rendered worthless by the removal of the child. In so far as such a description follows the disruption of normal family life after a reasonable lapse of time, the holder of the rights could be regarded as having exercised them from the outset, so that the situation described fulfils all the conditions laid down within the scope of the Convention. However, if a decision on custody by the courts of the child's habitual residence is considered, which modifies a prior decision and cannot be enforced because of the action of the abductor, it could be that the new holder of the right to custody has not exercised it within the extended time-limit. The difficulties which would be encountered in seeking to apply the Convention to such situations and perhaps to others not herein mentioned, are obvious. To conclude, although this provision must not be expected to come into play very often, it has to be said finally that its inclusion in the Convention might prove to be useful.

Article 4—Convention's scope ratione personae

75 This article concerns only the Convention's scope *ratione personae* as regards the children who are to be protected. However, for the sake of completeness, we shall also deal with the other aspects of the problem in their proper context,

that is to say those potential holders of custody and access rights and those who could be regarded as 'abductors', within the terms of the Convention.

a The children protected

76 The Convention applies to children of less than sixteen years of age, who were 'habitually resident in a Contracting State immediately before any breach of custody or access rights'. As regards the requirement that they be habitually resident, reference must again be made to those considerations previously expressed about the nature of the Convention, which lead to the conclusion that a convention based on co-operation among authorities can only become fully operational after the relationships envisaged come into existence as among Contracting States.

77 The age limit for application of the Convention raises two important questions. Firstly, the matter of age in the strict sense gave rise to virtually no dispute. The Convention kept the age at sixteen, and therefore held to a concept of 'the child' which is more restrictive than that accepted by other Hague Conventions.[31] The reason for this derives from the objects of the

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[31] For example: *Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* (article 1); *Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children* (article 1); *Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* (article 12); *Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decisions Relating to Adoptions* (article 1).

Convention themselves; indeed, a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority.

As for deciding upon the point at which this age should exclude the Convention's application, the most restrictive of the various options available was retained by the Convention. Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday.

78 The second problem deals with the situation of children under sixteen years of age who have the right to choose their own place of residence. Considering that this right to choose one's residence generally forms part of the right to custody, a proposal was put forward to the effect that the Convention should not apply in such cases.[32] However, this proposal was rejected on various grounds, *inter alia* the following: (1) the difficulty of choosing the legal system which should determine whether such a possibility exists, since there are at least three different laws which could be applicable, namely, national law, the law of habitual residence prior to the child's removal, and the law of the State of refuge; (2) the excessive restriction which this proposal would place upon the scope of the Convention, particularly with regard to access rights; (3) the fact that the right to decide a child's place of

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[32] *Cf.* Working Document No 4 (*Proposition de la délégation belge*) and *P.-v.* No 4.

residence is only one possible element of the right to custody which does not itself deprive it of all content. On the other hand, the decision taken in this regard cannot be isolated from the provision in article 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and degree of maturity. Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide on his place of residence, to take the view that the opinion of the child should always be the decisive factor. The point could therefore be reached where an optional provision of the Convention becomes automatically applicable, but such a result seems preferable to an overall reduction in the Convention's scope.

b The holders of custody and access rights

79 The problems raised by both of these rights in this regard are quite different. Firstly, as regards access rights, it is obvious, by the very nature of things, that they will always be held by individuals, whose identity will depend on the law which applies to the organizing of these rights. These persons will as a rule be close relatives of the child, and normally will be either its father or mother.

80 On the other hand, legal persons can also, in terms of the Convention, hold rights of custody. Article 3 envisages the possibility of custody rights being attributed to 'an institution or any

other body', and is expressed in deliberately vague and wide terms. In fact, during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate personality.

c The potential 'abductors'

81 The Convention contains no express provision on this matter. Nevertheless, two comments may be drawn from the text as a whole, which shed light upon this question in relation to the Convention's scope *ratione personae*. The first concerns the physical persons who may be responsible for the removal or retention of a child. On this, the Convention upholds the point of view adopted by the Special Commission by not attributing such acts exclusively to one of the parents.[33] Since the idea of 'family' was more or less wide, depending on the different cultural conceptions which surround it, it was felt better to hold a wide view which would, for example, allow removals by a grandfather or adoptive father to be characterized as child abduction, in accordance with the Convention's use of that term.

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[33] A more restrictive approach was to be found initially in the Dyer Report, referred to above, entitled *Report on international child abduction by one parent*.

82 The second comment relates to the possibility of an 'institution or any other body' acting as an 'abductor'. In this regard, it is difficult to imagine how any body whatever could remove, either by force or by deception, a child from a foreign country to its own land. On the other hand, if a child were entrusted, by virtue of a judicial or administrative decision (*i.e.* compulsory placement of the child) to such a body in the country of its habitual residence, the parent who sought to obtain the actual enjoyment of custody rights would stand little chance of being able to invoke the provisions of the Convention. In fact, by virtue of the fact that such bodies would as a rule exercise jurisdiction, except as regards the possible recognition of parental authority,[34] such a claim would not come within the scope of the Convention, since custody, in the sense understood by the Convention, would belong to the body in question.

Article 5—Certain terms used in the Convention

83 The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it. However, in this article, it does make clear the sense in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.

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[34] See the Judgment of the International Court of Justice, dated 28 November 1958, on the case concerning the application of the Convention of 1902 for regulating the guardianship of minors, *ICJ Reports* 1958, p. 55 et seq.

84 As regards custody rights, the Convention merely emphasizes the fact that it includes in the term 'rights relating to the care of the person of the child', leaving aside the possible ways of protecting the child's property. It is therefore a more limited concept than that of protection of minors',[35] despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all efforts to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence. However, if the child, although still a minor at law, has the right itself to determine its own place of residence, the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child.

On the other hand, although nothing is said in this article about the possibility of custody rights being exercised singly or jointly, such a possibility is clearly envisaged. In fact, a classic rule of treaty law requires that a treaty's terms be interpreted in their context and by taking into account the objective and end sought by the

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[35] See, for example, the *Convention of 5 October 1961 concerning the powers of authorities and the applicable law in respect of the protection of minors.*

treaty,[36] and the whole tenor of article 3 leaves no room for doubt that the Convention seeks to protect joint custody as well. As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in the light of the law of the child's habitual residence.

85 As regards access rights, sub-paragraph *b* of this article merely points out that they include 'the right to take a child for a limited period of time to a place other than the child's habitual residence'. Clearly, therefore, it is not intended that the Convention exclude all other ways of exercising access rights. Quite simply, it seeks to emphasize that access rights extend also to what is called 'residential access', that aspect of access rights about which the person who has custody of the child is particularly apprehensive. Moreover, since this explanatory provision in no way qualifies this 'other place' to which the child may be taken, one must conclude that access rights, in terms of the Convention, also include the right of access across national frontiers.

86 A proposal was made to include in this article a definition of the judicial or administrative authorities mentioned throughout the Convention's rules.[37] The difficulties encountered as much in reaching a systematic viewpoint on this as in devising a definition wide enough to encompass all possible contingencies

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[36] See article 31(1) of the Vienna Convention of 23 May 1969 on the law of treaties.

[37] See Working Document No 7 (Proposal or the United States delegation) and *P .-v.* Nos 4 and 14.

made for its exclusion. Now, as was mentioned earlier,[38] it is clear that these are the authorities who have the power, according to the internal law of each Contracting State, to determine questions concerning a child's custody or protection. Besides, it is precisely because of differences amongst these laws that reference is always made to judicial or administrative' authorities, so as to embrace all authorities which have jurisdiction in the matter, without regard to their legal characterization in each State.

CHAPTER II—CENTRAL AUTHORITIES

Article 6—Creation of Central Authorities

87 The role played by the Central Authorities, crucial factors as they are in the application of the Convention, has already been dealt with at length.[39]

As for those States which may appoint more than one Central Authority, the idea which prevailed was that the determining factor should be the existence of several territorial organizations for the protection of minors. Thus there was added to those cases of Federal States and States with more than one system of law that of States 'having autonomous territorial organizations', a term which is to be interpreted broadly.

Article 7—Obligations of Central Authorities

88 This article summarizes the role played by Central Authorities in bringing into play the

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38 See *supra*, No 45.

39 See *supra*, Nos 43 to 48.

system established by the Convention. The article is structured in two paragraphs, the first of which, drafted in general terms, sets out an overall duty of co-operation, while the second lists, from sub-paragraphs *a* to *i*, some of the principal functions which the Central Authorities have to discharge. Both result from a compromise between, on the one hand, those delegations which wanted strong Central Authorities with wide-ranging powers of action and initiative, and on the other hand those which saw these Authorities as straightforward administrative mechanisms for promoting action by the parties. Now, since these diverse attitudes reflected most of the deep differences which existed amongst the systems represented at the Conference, the ultimate solution had to be flexible, and such as would allow each Central Authority to act according to the law within which it has to operate. Therefore, although the Convention clearly sets out the principal obligations laid upon the Central Authorities, it lets each Contracting State decide upon the appropriate means for discharging them. And it is in this sense that the sentence occurring at the beginning of the second paragraph must be understood, which states that the Central Authorities are to discharge their listed functions 'either directly, or through any intermediary'. It is for each Central Authority to choose one or the other options, while working within the context of its own internal law and within the spirit of the general duty of co-operation imposed upon it by the first paragraph.

89 As we have just said, the rule in the *first paragraph* sets out the general duty of Central

Authorities to co-operate, so as to ensure the Convention's objects are achieved. Such co-operation has to develop on two levels: the Central Authorities must firstly co-operate with each other; however, in addition, they must promote co-operation among the authorities competent for the matters dealt with within their respective States. Whether this co-operation is promoted effectively will depend to à large extent on the freedom of action which each internal law confers upon the Central Authorities.

90 The functions listed in the *second paragraph* seek to trace, in broad outline, the different stages of intervention by Central Authorities in the typical case of child removal. Nonetheless, it is clear that this list is not exhaustive. For example, since the intervention of Central Authorities necessarily depends on their having been initially seized of the matter, either directly by the applicant or by the Central Authority of a Contracting State, then in the latter case the Central Authority initially seized will have to send the application to the Central Authority of the State in which the child is thought to be. Now, this obligation is not spelled out in article 7, but later, in the context of article 9. On the other hand, it is also clear that the Central Authorities are not obliged to fulfil, in every specific case, all the duties listed in this article. In fact, the circumstances of each particular case will dictate the steps which are to be taken by the Central Authorities; for example, it cannot be maintained that every Central Authority must discover the whereabouts of a

child when the applicant knows full well where it is.

91 In addition to finding the whereabouts of the child, where necessary (sub-paragraph *a*), the Central Authority must take or cause to be taken any provisional measures which could help prevent 'further harm to the child or prejudice to interested parties' (sub-paragraph *b*). The drafting of this sub-paragraph clearly brings out once again a fact which was emphasized above, namely, that the ability of Central Authorities to act will vary from one State to another. Basically, the provisional measures envisaged are designed in particular to avoid another removal of the child.

92 Sub-paragraph *c* sets out the duty of Central Authorities to try to find an extrajudicial solution. In actual fact, in the light of experience as spoken to by some delegates, a considerable number of cases can be settled without any need to have recourse to the courts. But, once again, it is the Central Authorities which, in those stages preceding the possible judicial or administrative proceedings, will direct the development of the problem; it is therefore for them to decide when the attempts to secure the 'voluntary return' of the child or to bring about an 'amicable resolution', have failed.

93 Sub-paragraph *d* relates to the exchange of information about the social background of the child. This duty is made subject to the criteria adopted by the Central Authorities involved in a particular case. Indeed, the insertion of the phrase 'where desirable' demonstrates that there is no wish to impose an inflexible obligation here: the

possibility of there being no information to provide, as well as the fear that reference to this provision might be used by the parties as a delaying tactic, are some of the arguments which prompted this approach. On the other hand, a proposal which would have made the transmission of certain information conditional upon its remaining confidential, was rejected.[40]

94 The obligation laid upon Central Authorities to provide information on the content of the law in their own States for the application of the Convention appears in sub-paragraph *e*. This duty applies in particular to two situations. Firstly, where the removal occurs prior to any decision as to the custody of the child, the Central Authority of the State of the child's habitual residence is to produce, for the purposes of the Convention's application, a certificate on the relevant law of that State. Secondly, the Central Authority must inform the individuals about how the Convention works and about the Central Authorities, as well as about the procedures available. On the other hand, the possibility of going further, by obliging the Central Authorities to give legal advice in individual cases, is not envisaged by this rule.

95 When it is necessary, in order to obtain the child's return, for the judicial or administrative authorities of the State in which it is located to intervene, the Central Authority must itself initiate proceedings (if that can be done under its internal law) or facilitate the institution of

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[40] See Working Document No 9 (Proposal of the United Kingdom delegation) and *P.-v.* No 5.

proceedings. This duty also extends to proceedings which prove to be necessary for organizing or securing the effective exercise of rights of access (sub-paragraph *f*).

96 Where the Central Authority is not able to apply directly to the competent authorities in its own State, it must provide or facilitate the provision of legal aid and advice for the applicant, in terms of article 25 (sub-paragraph *g*). It is appropriate to point out here very briefly that the phrase 'where the circumstances so require' in this sub-paragraph refers to the applicant's lack of economic resources, as determined by the criterià laid down by the law of the-state in which such assistance is sought, and that it does not therefore refer to abstract considerations as to the convenience or otherwise of granting legal aid.

97 Following the method adopted by this paragraph, sub-paragraph *h* includes among the Central Authorities' obligations the bringing into play in each case of such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.

98 Finally, sub-paragraph *i* sets forth an obligation on the part of Central Authorities which does not directly concern individuals but only the Convention itself. It is the duty 'to keep each other informed with respect to the operation of the Convention, and, as far as possible, to eliminate any obstacles to its application'. This obligation is to operate on two complementary levels, firstly at the level of bilateral relations between States which are Party to the Convention, and secondly on a multilateral level,

through participating when required in commissions called for this purpose by the Permanent Bureau of the Hague Conference.

CHAPTER III—RETURN OF THE CHILD

Article 8—Applications to Central Authorities

99 In terms of the *first paragraph*, an application for the return of a child can be addressed to any Central Authority which, from that point, will be bound by all the obligations laid down by the Convention. This demonstrates that the applicant is free to apply to the Central Authority which in his opinion is the most appropriate. However, for reasons of efficiency, the Central Authority of the child's habitual residence is expressly mentioned in the text, but this must not be understood as signifying that applications directed to other Central Authorities are to be regarded as exceptional.

100 Since use of the model form is merely recommended, it was necessary to include in the text of the Convention the elements which any application submitted to a Central Authority must contain in order to be admissible, as well as the optional documents which may accompany or supplement such an application. The elements which every application to a Central Authority must contain, in this context, are those listed in the *second paragraph* of article 8. In particular, they are facts which allow the child and interested parties to be identified, such as those which may be able to help in locating the child (sub-paragraphs *a*, *b*, and *d*). As regards information on

the child's date of birth, the Convention makes it clear that this should be supplied only 'where available'. This provision is intended to favour action by an applicant who is ignorant of such a fact but who will, however, always have to supply precise information on the age of the child, since the provisions of article 4 may result in his application being rejected, in terms of article 27.

Moreover, the application must contain 'the grounds on which the applicant's claim for return of the child is based' (sub-paragraph *c*). This requirement is logical, in that it allows the application of article 27 concerning the right of Central Authorities to reject applications which are clearly not well-founded. The grounds must in principle refer to the two elements, legal and factual, contained in article 3. Now, since the legal element in particular may depend on the provisions of the law of the child's habitual residence, or upon a decision or agreement, it might have been expected that documentary support would be required at this initial stage. However, the Convention chose to follow a different route and placed this evidence amongst those documents which may, optionally, accompany or supplement the application. The reason for this is that obtaining the documents in question is sometimes difficult and, what is more, could take up precious time better spent in speedily discovering the whereabouts of the child. Moreover, whenever a Central Authority succeeds in bringing about the voluntary return of the child or an amicable resolution of the affair, such requirements may seem merely accessory.

101 Understood thus, the first two sub-paragraphs of the third paragraph, dealing with the optional provision of documents which may accompany or supplement applications, are seen to refer to documents which are fundamental to a claim for the return of the child. It must be emphasized firstly that the requirement that copies of any decision or agreement be authenticated in no way contradicts the provision in article 23 that 'no legalization or similar formality may be required in the context of this Convention'. It is simply a matter of verifying what were originally copies or private documents so as to guarantee that they correspond to the originals and thus to secure their free circulation.

Secondly, proof of the substantive law of the State of the child's habitual residence may be established by either certificates or affidavits, that is to say documents which include solemn statements for which those who make them assume responsibility. As regards those persons who may adduce such statements, the Convention chose to define them widely, a fact which must make the task of the applicant easier (sub-paragraph *f*). Thus, they may emanate from any qualified person—for example, an attorney, solicitor, or barrister or research institution—as well as from the Central Authorities and the other competent authorities of the State of the child's habitual residence.

On the other hand, it should be stressed that at à later stage, when the judicial or administrative authorities of the State of refuge have been called upon to intervene, they may, in terms of article

15, request the production of certain documents which were considered to be optional at the time of application to the Central Authorities.

Lastly, the Convention acknowledges that the application may be accompanied or supplemented by 'any other relevant document' (sub-paragraph *g*). In theory, since it is the dispossessed guardian of the child who brings the application, it is for him to provide these supplementary documents. This does not preclude the Central Authority to which the application was originally made, where the application is sent to another Central Authority, from accompanying the application by, *inter alia*, information concerning the social background of the child (if it has such information at its disposal and considers it to be useful), by virtue of the task laid upon it by article 7, paragraph 2*d*.

Article 9—Transmission of the application to the Central Authority of the State where the child is located

102 A direct consequence of the applicant's right to apply to the Central Authority of his choice is the duty imposed on the latter to transmit the application to the Central Authority of the State in which it has reason to believe the child is located; this duty arises also when the Central Authority which is informed of a case by another Central Authority reaches the conclusion that the child is in fact located in a different country. This is a task which supplements the framework of duties outlined in article 7, since it relates directly to the duty of co-operation amongst

Central Authorities established by the first paragraph of that article.

Now, although the meaning of article 9 may be clear, it has not been very artfully drafted. The 'requesting Central Authority' to which this article refers exists only where the application submitted in accordance with article 8 has been transmitted to *another* Central Authority in terms of article 9 itself. Consequently, the duty to inform a 'requesting Central Authority' exists only when the application has been transmitted to a third Central Authority, the child not being located in the State of the second Central Authority to which the application was sent. But on the other hand, the duty to transmit an application in terms of this article devolves upon *any* Central Authority, independently of the fact that it was seized of the matter either directly or through the intervention of another Central Authority, since this provision must be understood as applying to both of the cases it is meant to cover.

Article 10—Voluntary return of the child

103 The duty of Central Authorities, stated in article 7(2)(c), to 'take all appropriate measures to secure the voluntary return of the child', is given preferential treatment in this article, which highlights the interest of the Convention in seeing parties have recourse to this way of proceeding. The phrase 'before the institution of any legal or administrative proceedings' which preceded this provision in the Preliminary Draft, and restricted the duty included within it to a particular point in time, was deleted from the text of the Convention.

The reason for this deletion is the difficulty experienced by some legal systems in accepting that a public authority, such as a Central Authority, could act before an application had been brought before the competent authorities; however, the whole tenor of the provision shows that the Central Authorities of other States are not precluded from acting in that way. On the other hand, it is in no way an inflexible obligation, for two reasons: firstly, efforts to secure the voluntary return of the child which were begun prior to the referral of the matter to the judicial or administrative authorities may be pursued thereafter, and secondly, in so far as the initiative for the return of the child has not been transferred to those authorities, it is for the Central Authority to decide whether the attempts to achieve this objective have failed.

Moreover, the measures envisaged in this article are not intended to prejudice the efforts of Central Authorities to prevent further removals of the child, pursuant to article 7(2)(b).

Article 11—The use of expeditious procedures by judicial or administrative authorities

104 The importance throughout the Convention of the time factor appears again in this article. Whereas article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the *first paragraph* of this article restates the obligation, this time with regard to the authorities of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty:

firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

105 The *second paragraph*, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time-limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. Moreover, after the Central Authority of the requested State receives the reply, it is once more under a duty to inform, a duty owed either to the Central Authority of the requesting State or to the applicant who has applied to it directly. In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken.

Articles 12 and 18—Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.

Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to

emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension

of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem*, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention. To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary

proceedings,[41] to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted[42] plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its

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41 See Report of the Special Commission, No 92.

42 See Working Document No 25 (Proposal of the delegation oft he Federal Republic of Germany) and *P.-v.* Nos 7 and 10.

habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to such a conclusion are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Articles 13 and 20—Possible exceptions to the return of the child

113 In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned.[43] We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion—and does not

[43] See *supra*, Nos 28 to 35.

impose upon them a duty—to refuse to return a child in certain circumstances.

114 With regard to *article 13*, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs *a* and *b* is imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

115 The exceptions contained in *a* arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Convention includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child. Thus, if the text of this provision is compared with that of article 5 which contains a definition of custody rights, it can be seen that custody is exercised effectively when the custodian is concerned with the care of the child's person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its

guardian do not live together. It follows from this that the question of whether custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case.

Moreover, by relating this paragraph to the definition of wrongful removal or retention in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the categorization of protected situations, contained in article 3, governs the whole Convention, and cannot be contradicted by a contrary interpretation of any of the other articles.

On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties.

116 The exceptions contained in *b* deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the

deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects,[44] that the exceptions are to receive a wide interpretation.

117 Nothing requires to be added to the preceding commentary on the second paragraph of this article (notably in No 31, *supra*.

The third paragraph contains a very different provision which is in fact procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence. Such information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article.

118 It is significant that the possibility, acknowledged in *article 20*, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the

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[44] See Working Documents Nos 12 (Proposal of the United States delegation) and 42 (*Proposition de la délégation hellénique*). and also *P. -v.* No 8.

requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the Jaws on human rights and fundamental freedoms is undertaken with a care which one

must expect to see maintained in the international situations which the Convention has in view.

Article 14—Relaxation of the requirements of proof of foreign law

119 Since the wrongful nature of a child's removal is made to depend, in terms of the Convention, on its having occurred as the result of a breach of the actual exercise of custody rights conferred by the law of the child's habitual residence, it is clear that the authorities of the requested State will have to take this law into consideration when deciding whether the child should be returned. In this sense, the provision in article 13 of the preliminary draft Convention,[45] that the authorities 'shall have regard to' the law of the child's habitual residence, could be regarded as superfluous. However, such a provision would on the one hand underline the fact that there is no question of applying that law, but merely of using it as a means of evaluating the conduct of the parties, while on the other hand, in so far as it applied to decisions which could underlie the custody rights that had been breached, it would make the Convention appear to be a sort of *lex specialis*, according to which those decisions would receive effect indirectly in the requested State, an effect which would not be made conditional on the obtaining of an *exequatur* or any other method of recognition of foreign judgments.

Since the first aspect of article 14 necessarily derives from other provisions of the Convention,

[45] See Report of the Special Commission, Nos 102-103.

the actual purport of article 14 is concerned only with the second. The article therefore appears as an optional provision for proving the law of the child's residence and according to which the authority concerned 'may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable'. There is no need to stress the practical importance this rule may have in leading to the speedy decisions which are fundamental to the working of the Convention.

Article 15—The possibility of requesting a decision or other determination from the authorities of the child's habitual residence

120 This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child's habitual residence will apply in a particular case. Where this is so, the authorities concerned can request 'that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination'. Only two comments will be made here. The first concerns the voluntary nature of the request, in the sense that the return of the child cannot be made conditional upon such decision or other determination being provided. This conclusion arises in fact as much from the actual terms of the article (which speaks of 'requesting' and not

'requiring') as from the fact acknowledged in the same provision, that it may be impossible to obtain the requested documents in the State of the child's residence. Now, with regard to this last point, the duty which the article places upon Central Authorities to help the applicant obtain the decision or determination must make his task easier, since the Central Authority can provide a certificate concerning its relevant law in terms of article 8(3)(f). Secondly, the contents of the decision or certificate must have a bearing upon the wrongful nature, in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, *prima facie*, were being exercised legitimately and in actual fact, in terms of the law of the child's habitual residence.

Article 16—Prohibition against deciding upon the merits of custody rights

121 This article, so as to promote the realization of the Convention's objects regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained. This prohibition will disappear when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under

the Convention having been lodged. The two sets of circumstances which can put an end to the duty contained in the article are very different, both in the reasons behind them and in their consequences. In fact, it is perfectly logical to provide that this obligation will cease as soon as it is established that the conditions for a child's return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20. Moreover, in such cases, the decision on the merits of the custody rights will finally dispose of the case.

On the other hand, since the 'notice' which may justify the prohibition against deciding upon the merits of the case must derive either from an application for the return of the child which is submitted directly by the applicant, or from an official communication from the Central Authority of the same State, it is difficult to see how cases in which the notice is not followed by an application would not be contained within the first hypothesis. Moreover, if such situations do exist, the ambiguity in the phrase 'reasonable time' could lead to decisions being taken before the period of one year, contained in article 12, first paragraph, has expired; in such a case, this decision would coexist alongside the duty to return the child, in accordance with the Convention, thus giving rise to a problem which is dealt with in article 17.

Article 17—The existence of a decision on custody in the requested State

122 The origins of this article clearly demonstrate the end pursued. The First Commission initially adopted a provision which gave absolute priority to the application of the Convention, by making the duty to return the child prevail over any other decision on custody, which had been issued or was likely to be issued in the requested State. At the same time, it accepted the possibility of a reservation allowing the return of the child to be refused, when its return was shown to be incompatible with a decision existing in the State of refuge, prior to the 'abduction'.[46] The current text is therefore the result of a compromise which was reached in order to eliminate a reservation in the Convention, without at the same time reducing the extent of its acceptability to the States.[47] In this way, the original provision was recast by emphasizing that the sole fact that a decision existed would not of itself prevent the return of the child, and by allowing judges to take into consideration the reasons for this decision in coming to a decision themselves on the application for the child's return.

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[46] Working Documents Nos 53, paragraph 2 (Proposal of the United Kingdom delegation), 32, article XG (Proposal of the Netherlands delegation), and 19 (Proposal of the Japanese delegation), as well as *P.-v.* No 12.

[47] See Working Document No 77 (Proposal of the Chairman, supported by the Rapporteur and the delegations of Australia, Canada, Finland, France, the Federal Republic of Germany, Ireland. Spain, Switzerland and the United Kingdom) and *P.-v.* No 17.

123 The solution contained in this article accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means either of a 'dead' decision taken prior to the removal but never put into effect, or of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud. Consequently, the competent authority of the requested State will have to regard the application for the child's return as proof of the fact that a new factor has been introduced which obliges it to reconsider a decision which has not been put into effect, or which was taken on the basis of exorbitant grounds of jurisdiction, or else failed to have regard to the right of all the parties concerned to state their case. Moreover, since the decision on the return of the child is not concerned with the merits of custody rights, the reasons for the decision which may be taken into consideration are limited to those which concern 'the application of the Convention'. A situation brought about by a decision issued by the authorities of the State of a child's habitual residence prior to its 'abduction' and which granted custody to the 'abductor', would normally be resolved by applying article 3 of the Convention, since the existence of a claimed right to custody must be understood in accordance with the law of that State.

Article 19—Scope of the decisions on the return of the child

124 This provision expresses an idea which underlies the whole of the Convention; as a matter

of fact, in this Report we have already been concerned on several occasions as much with the reasons for it as with commenting upon it.

This article is restricted to stating the scope of decisions taken regarding the return of the child which the Convention seeks to guarantee, a return which, so as to be 'forthwith' or 'speedy', must not prejudge the merits of custody rights; this provision seeks to prevent à later decision on these rights being influenced by a change of circumstances brought about by the unilateral action of one of the parties.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

125 Above all, it must be recognized that the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention's objectives. Indeed, even if the attention which has been paid to access rights results from the belief that they are the normal corollary of custody rights, it sufficed at the Convention level merely to secure co-operation among Central Authorities as regards either their organization or the protection of their actual exercise. In other respects, the best indication of the high level of agreement reached regarding access rights is the particularly short amount of time devoted to them by the First Commission.

126 As we have just pointed out, the article as a whole rests upon co-operation among Central Authorities. A proposal which sought to insert a

provision in a new paragraph that both the authorities and the law of the State of the child's habitual residence should have exclusive jurisdiction in questions of access rights, was rejected by à large majority.[48] The organizing and securing of the actual exercise of access rights was thus always seen by the Convention as an essential function of the Central Authorities. Understood thus, the first paragraph contains two important points: in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, *i.e.* their establishment, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody. With this in view, the article's third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries.

127 The nature of the problems tackled in the second paragraph is very different. Here it is a question of securing the peaceful enjoyment of access rights without endangering custody rights. This provision therefore contains important elements for the attainment of this end. Once

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[48] See Working Document No 31 (Proposal of the Danish delegation) and *P.-v.* No 13.

again, cooperation among Central Authorities is placed, of necessity, in the very centre of the picture, and it is a co-operation designed as much to promote the exercise of access rights as to guarantee the fulfilment of any conditions to which their exercise may be subject.

Of all the specific ways of securing the execise of access rights, article 21 contains only one, where it points out that the Central Authority must try 'to remove, as far as possible, all obstacles to the exercise of such rights', obstacles which may be legal ones or may originate in possible criminal liability. The rest is left up to the co-operation among Central Authorities, which is regarded as the best means of ensuring respect for the conditions imposed upon the exercise of access rights. In fact, such respect is the only means of guaranteeing to the custodian that their exercise will not harm his own rights.

128 The Convention gives no examples of how Central Authorities are to organize this co-operation so as to secure the 'innocent' exercise of access rights, since such examples could have been interpreted restrictively. Mention could however be made purely indicatively as in the Report of the preliminary draft Convention,[49] of the fact that it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to

[49] See Report of the Special Commission. No 110.

return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority.

CHAPTER V—GENERAL PROVISIONS

129 This chapter contains a series of provisions which differ according to the topics with which they deal, and which had to be dealt with outside the framework of the foregoing chapters. On the one hand, there are certain procedural provisions common both to the proceedings for the return of the child and to the organization of access rights, and on the other hand there are provisions for regulating the problems arising out of the Convention's application in States with more than one system of law, as well as those which concern its relationship with other conventions and its scope *ratione temporis*.

Article 22—'Cautio judicatum solvi'

130 Following a marked tendency to favour the deletion from the Convention of procedural measures which discriminated against foreigners, this article declares that no security, bond or deposit, however described, shall be required within the context of the Convention. Two short comments are in order here. The first concerns the scope of the stated prohibition *ratione personae*; on this point, an extremely liberal solution was arrived at, such as was required by a convention built upon the basic idea of protecting children.[50] Secondly, the security, bond or deposit from which foreigners are exempt are those which, in any legal system and howsoever described, are meant to guarantee respect for decisions on the payment of costs and expenses arising out of legal proceedings. The article, in its concern for coherence, states that the rule will apply only to those 'judicial or administrative proceedings falling within the scope of the Convention', and avoids a wider formulation which could have been interpreted as applicable, for example, to proceedings raised directly for a decision on the merits of custody rights. On the other hand, it can clearly be inferred from the preceding observations that it does not prevent other types of security, bond or deposit being required, particularly those which are imposed so as to guarantee the proper exercise of access rights.

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[50] See the more restrictive construction which was incorporated in article 14 of the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

Article 23—Exemption from legalization

131 This article repeats word for word the text of the equivalent article in the preliminary draft Convention, which merely set forth in a separate provision an idea which is to be found in all Hague Conventions, involving the transmission of documents among Contracting States. The fact that it has been drafted in wide terms means that not only 'diplomatic legalization', but also any other similar sort of requirement, is forbidden. However, any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision.

Article 24—Translation of documents

132 As regards the languages which are to be used as among Central Authorities, the Convention upheld the approach in the Preliminary Draft, by which documents are to be sent in their original language, accompanied by a translation into one of the official languages of the requested State or, where that is not feasible, a translation into French or English.[51] In this matter, the Convention also allows a reservation to be made in terms of article 42, under which a Contracting State can object to the use of one or other of the substitute languages, but this reservation cannot of course exclude the use of both. Finally, it must be emphasized firstly that the scheme which has been chosen offers only a

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[51] A somewhat different approach is found in article 7 of the *Convention on International Access to Justice*, referred to *supra*.

minimal facility and may be improved upon by other conventions which exclude any requirement of translation as among States which are Party to them, and secondly that it governs only communications among Central Authorities. Consequently, applications and other documents sent to internal judicial or administrative authorities will have to conform to the rules regarding translation laid down by the law of each State.

Article 25—Legal aid and advice

133 The relevant provision here enlarges the scope of legal aid in two respects. Firstly, it includes among the possible beneficiaries persons habitually resident in a Contracting State as well as that State's own nationals. Secondly, the legal aid available is extended to cover legal advice as well, which is not invariably included in the various systems of legal aid operated by States.[52]

Article 26—Costs arising out of the Convention's application

134 The principle enunciated in the first paragraph, under which each Central Authority bears its own costs in applying the Convention, met no opposition. Quite simply, it means that a Central Authority cannot claim costs from another Central Authority. It must however be admitted that the costs envisaged will depend on the actual services provided by each Central Authority,

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[52] See, in similar vein, articles I and 2 of the *Convention on International Access to Justice*, referred to *supra*.

according to the freedom of action conferred upon it by the internal law of the State concerned.

135 On the other hand, the second paragraph refers to one of the most controversial matters dealt with by the Fourteenth Session, a matter which in the end had to be resolved by accepting the reservation in the third paragraph of the same article. In fact, the argument between those delegations which wanted the applicant to be exempt from all costs arising out of the application of the Convention (including exemption from all costs and expenses not covered by the legal aid and advice system such as those which arise out of legal proceedings or, where applicable, the participation of counsel or legal advisers), and those which favoured the opposite solution adopted by the preliminary draft Convention,[53] was resolved only by including a reservation favouring the latter's point of view. The reason for this was that, since different criteria for the granting of legal aid were rooted in the very structure of the legal systems concerned, any attempt to make one approach prevail absolutely over the others would have led to the automatic exclusion of certain States from the Convention, a result which no one wanted.[54] However, there was total agreement as regards the rule contained in the last sentence of the

[53] Article 22(2)(a) of the Preliminary Draft prepared by the Special Commission.

[54] See Working Documents Nos 51 and 61 (*Proposition de la délégation belge*) and Nos 57 and 67 (Proposals of the Canadian. Netherlands and United States delegations) and also *P.-v.* Nos 11 and 14.

second paragraph, authorizing the Central Authorities to 'require the payment of the expenses incurred or to be incurred in implementing the return of the child'.

136 The fourth paragraph contains a quite different type of provision, by which the competent internal authorities may direct the 'abductor' or the person who prevented the exercise of access rights, to pay necessary expenses incurred by or on behalf of the applicant, including 'travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child'. But since this rule is only an optional provision, which recognizes the discretion which may be exercised by the courts in each case, its scope would seem to be particularly symbolic, a possible deterrent to behaviour which is contrary to the objects of the Convention.

Article 27—Possible rejection of an application

137 Common sense would indicate that Central Authorities cannot be obliged to accept applications which belong outside the scope of the Convention or are manifestly without foundation. In such cases, the only duty of Central Authorities is to 'inform forthwith the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons'. This means that an application may be rejected by the Central Authority to which the applicant applied directly as well as by a Central Authority which was initially brought into the case by another Central Authority.

Article 28—Authorization required by the Central Authority

138 The provision in this article is merely another example of the Convention's attitude to the organization and powers of Central Authorities. Since the aim is to avoid requiring States to change their own law in order to be able to accept the Convention, the Convention takes into consideration the fact that, in terms of the law of various Member States of the Conference the Central Authority would have the power to require some authorization from the applicant. As a matter of fact, the 'model form', as an example of the documents which might be attached to an application (see note to No IX), brings in a reference to 'the authorization empowering the Central Authority to act on behalf of the applicant', an authorization which, every time it is required by a Central Authority, will have to accompany those matters listed in article 8 and the applications submitted under article 21.

Article 29—Direct application to competent internal authorities

139 The Convention does not seek to establish a system for the return of children which is exclusively for the benefit of the Contracting States. It is put forward rather as an additional means for helping persons whose custody or access rights have been breached. Consequently, those persons can either have recourse to the Central Authorities—in other words, use the means provided in the Convention—or else pursue a direct action before the competent authorities in

matters of custody and access in the State where the child is located. In the latter case, whenever the persons concerned opt to apply directly to the relevant authorities, a second choice is open to them in that they can submit their application 'whether or not under the provisions of this Convention'. In the latter case the authorities are not of course obliged to apply the provisions of the Convention, unless the State has incorporated them into its internal law, in terms of article 2 of the Convention.

Article 30—Admissibility of documents

140 This provision was intended to resolve the problem which existed in some Member States regarding the admissibility of documents. It merely seeks to facilitate admission before the judicial or administrative authorities of Contracting States of applications submitted either directly or through the intervention of a Central Authority, as well as documents which may be attached or supplied by the Central Authorities. In fact, this article must not be understood to contain a rule on the evidential value which is to be placed on these documents, since that problem falls quite outwith the scope of the Convention.[55]

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[55] See article 26 of the preliminary draft Convention, Working Document No 49 (Proposal of the United States delegation) and *P.-v.* No 11.

Articles 31 to 33—Application of the Convention in relation to States with more than one system of law

141 These three articles govern the Convention's application to States with non-unitary legal systems. As in recent conventions of the Hague Conference, a distinction has been drawn between States which have several systems of law applicable in different territorial units, and those with several systems of law applicable to different categories of persons. To be more precise, the solution adopted received its inspiration from that reached by the conventions drawn up during the Thirteenth Session of the Conference.[56] As regards the first group of States, article 31 explains how references to the child's habitual residence and to the law of the State of its habitual residence are to be understood.

As regards the second type, article 32 leaves the determination of the applicable law to the rules in force in each State.

Finally, it must be emphasized that the substantive provisions of these two articles are not restricted to the States directly concerned. In actual fact, the relevant rules are to be taken into consideration by all Contracting States in their relations with each other, for example whenever a child is removed from one of those States to another State with a unified or non-unified legal system.

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[56] See in particular Mr von Overbeck's Report on the Convention on the Law Applicable to Matrimonial Property Regimes, in *Acts and Documents of the Thirteenth Session*, Book II, p. 374 *et seq.*

142 On the other hand, article 33 limits the occasions where States with more than one system of law are obliged to apply the Convention, by excluding those in which a State with a unified system of law would not be bound to do so. Put shortly, this article merely states that the Convention applies only at the international level and at the same time characterizes as internal all those relationships which arise within a State, whether or not that State has more than one system of law.

Article 34—Relationship to other conventions

143 This article was commented upon in the first part of the Report (Nos 39 and 40).

Article 35—Scope of the Convention ratione temporis

144 The question as to whether the Convention should apply to abductions involving two States and which occurred prior to its entry into force or only to those occurring thereafter, was met with different proposed solutions during the Fourteenth Session. The first proposal was undoubtedly the most liberal, since it envisaged the Convention's applying to all 'abductions', irrespective of when it came into effect.[57] However, this decision was followed by acceptance of the idea that any Contracting State could declare that the Convention would apply only to 'abductions' which occurred after its entry into force in that

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[57] See Working Document No 53 (Proposal of the United Kingdom delegation) and *P.-v.* No 13.

State.[58] The situation therefore remained largely unresolved, with each State, where it deemed this necessary, being able to limit the Convention's application. It was clear that the operation of such declarations within a convention which is clearly bilateral in its application would create some technical problems, to alleviate which the First Commission finally pronounced itself in favour of the opposite solution to that first adopted, *i.e.* the more restrictive. It is seen therefore in article 35, by which the Convention is to apply as among Contracting States 'only to wrongful removals or retentions occurring after its entry into force in those States'.[59] On the other hand, the inference must be drawn from the Convention's provisions as a whole (and in particular article 12, second paragraph) that no time-limit is imposed on the submission of applications, provided the child has not reached sixteen years of age, in terms of article 4. In fact, the commencement of an action after the expiry of the one year period stated in the first paragraph of article 12, merely lessens the obligation to cause the child to be returned, whilst it is recognized that the obligation will not arise if the child is shown to have become settled in its new environment.

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[58] See Working Document No 68 (Proposal of the Canadian delegation) and *P.-v.* No 15.

[59] See Working Document No 81 (Proposal of the Chairman with the consent of the delegations of Austria, the Federal Republic of Germany, Switzerland and the United Kingdom) and *P.-v.* No 18. An oral proposal of the Reporter that the Convention be extended to cover situations which occurred during the year prior to its entry into force was not accepted.

145 The provision certainly has the merit of being clear. However, it cannot be denied that its application is fated to frustrate the legitimate expectations of the individuals concerned. But since in the last resort it is a limitation on the duty to return the child, it in no way prevents two or more States agreeing amongst themselves to derogate from it in terms of article 36, by agreeing to apply the Convention retroactively.

Moreover, the provision concerns only those provisions in the Convention regarding the return of the child. In actual fact, the provision of the Convention governing access rights can, in the nature of things, only be invoked where their exercise is refused or continues to be refused after the Convention has come into force.

Article 36—Possibility of limiting by agreement the restrictions on the return of the child

146 This article, conform to the general principles underlying the Convention, which are based on the experience derived from other Hague Conventions,[60] allows two or more Contracting States to agree to derogate as amongst themselves from any of the Convention's provisions which may involve restrictions on the return of the child, in particular those contained in articles 13 and 20. This demonstrates, on the one hand, the compromise character of some of the Convention's provisions and the possibility that criteria more favourable to the principal object of the Convention may be adopted to govern

[60] See, for example, the *Convention of 1 March 1954 on civil procedure.*

relationships among States which share very similar legal concepts, while on the other hand, as we have emphasized on several occasions throughout this Report, the Convention is not to be regarded as in any way exclusive in its scope. Now, if such supplementary conventions see the light of day, one negative consequence, feared by some delegations, will have to be avoided, namely that beyond the geographical limits of such agreements, the States concerned will be tempted to interpret the limitations contained in the Convention in a wide sense, thus weakening its scope.[61]

CHAPTER VI—FINAL CLAUSES

147 The final clauses in articles 37 to 45 of the Convention have been drafted in accordance with similar provisions adopted by the most recent sessions of the Hague Conference. No detailed commentary is therefore necessary and we shall make only a few brief comments on them.

Firstly, the adaptation of the final clauses to the decision which was taken on the conditional opening of the Convention to non-Member States. This point has been dealt with earlier,[62] and it is sufficient merely to emphasize here that the 'semi-closed' character of the Convention derives from the means by which States Parties may declare their acceptance and not from any restriction

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[61] See Working Documents Nos 70 (*Proposition des délégations belge, française et luxembourgeoise*) and 80 (Proposal of the United States delegation) as well as *P.-v.* Nos 16 and 18.

[62] See *supra*, No 42.

placed on the States which may accede to it (article 38).

148 With regard to the 'degree' of acceptance of the Convention by States which contain two or more territorial units in which different systems of law are applicable to matters dealt with in this Convention, article 40 provides that they may declare—at the time of signature, ratification, acceptance, approval or accession—that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration can be modified at any time by another more extensive declaration. Actually, any modification of a declaration which tends to limit the applicability of the Convention ought to be regarded as a partial denunciation in terms of article 44, third paragraph.

Under article 39, the same result will occur with regard to States which are responsible for the international relations of other territories. Although such situations are meant to disappear as a logical consequence of the progressive application of the principle which proclaims the right of peoples to self-determination, the Conference felt it advisable to keep a clause which might yet prove to be useful.

149 Finally, a word should be said on article 41, since it contains a wholly novel provision in Hague Conventions. It also appears in the other Convention adopted at the Fourteenth Session, *i.e. the Convention on International Access to Justice*, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.

This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see *P.-v.* No 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of à large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties.

150 On the question of reservations, the Convention allows only those provided for in articles 24 and 26. No other reservation is permitted. Moreover, article 42 sets forth the customary provision whereby a State can 'at any time withdraw a reservation it has made'.

151 Finally, the importance placed on the duty which was assumed by the Ministry of Foreign Affairs of the Kingdom of the Netherlands (article 45) to notify Member States and Contracting States should be emphasized, particularly in view of the role played by declarations of acceptance of future accessions in a convention such as this.

Madrid, April 1981

ELISA PÉREZ-VERA

PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 12-820

Supreme Court, U.S.
FILED
AUG 30 2013
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IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

The United States enacted the International Child Abduction Remedies Act ("ICARA") to implement the Hague Convention on the Civil Aspects of Child Abduction (the "Hague Convention" or the "Convention"). ICARA and the Convention mandate that, subject to certain defenses inapplicable here, where a left-behind parent commences a return proceeding within one year of the wrongful international removal, the court must order the child returned forthwith. Where a left-behind parent commences the return proceeding one year or more after the child's wrongful international removal, a court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Art. 12.

The question presented is:

When the abducting parent has concealed the whereabouts of the child from the left-behind parent, is equitable tolling available as to Article 12's one-year period?

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The Second Circuit's opinion is reported at 697 F.3d 41, and reproduced at Pet. App. 1a–34a. The opinion of the United States District Court for the Southern District of New York is published at 809 F. Supp. 2d 197, and reproduced at Pet. App. 39a–116a.

JURISDICTION

The court of appeals entered judgment on October 1, 2012. *Id.* at 1a. Petitioner filed a timely petition for a writ of certiorari on January 2, 2013, which this Court granted on June 24, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT TREATY AND STATUTORY PROVISIONS

The International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601–11610 (2005) is reproduced at Pet. App. 117a–28a. The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted at* 51 Fed. Reg. 10,494 (1986), is reproduced at Pet. App. 129a–49a.

INTRODUCTION

From the moment that Manuel Jose Lozano realized Diana Montoya Alvarez had abducted their three-year-old daughter from their home, he commenced an exhaustive search to locate his child in England, where Alvarez remained with the child for seven months. When Lozano's attempts to locate his child were rebuffed by Alvarez and her family, he pursued his rights and remedies through English law enforcement, public agencies, the English court

system, and the parties' respective solicitors. As the district court found below, he was "remarkably diligent."

Seven months after the domestic abduction, Alvarez wrongfully removed the child from England to France. Shortly thereafter, she took the child to the United States. Lozano and his solicitors, unaware that Alvarez had removed the child, continued efforts and legal processes to locate his daughter and prohibit her removal from England. Lozano lacked the critical knowledge that his avenue for relief now had become the Hague Convention and the one-year period under Article 12 had begun to run.

Eight months after Alvarez had left England, her trail went cold. Lozano and his solicitors concluded it likely that Alvarez had left the country. He promptly filed an Application with the United Kingdom's Central Authority, which forwarded the Application to the United States Department of State. The State Department confirmed Alvarez had entered this country, assisted Lozano in obtaining counsel, and provided counsel with her last known address here. With the aid of a private investigator, counsel established the child's location and filed a petition for return, within sixteen months of her wrongful removal and eight months of Lozano and his solicitors concluding that Alvarez likely had removed the child.

During trial, Lozano argued that the one-year period under Article 12 should be equitably tolled for the period of concealment. Contrary to the law of each of the Federal courts of appeals to have addressed the issue and the overwhelming majority of district courts to have done so, the district court

held that equitable tolling, as a matter of law, is not available with respect to the one-year period and, even if it were available, it should not apply here because the acts of concealment were not "egregious." The Second Circuit affirmed.

Petitioner requests the Court reverse and hold that equitable tolling is available with respect to the one-year period under Article 12 and applicable where a petitioner satisfies the elements established in *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005).

STATEMENT OF THE CASE

I. ICARA & The Hague Convention.

Congress enacted ICARA premised on findings that "[p]ersons should not be permitted to obtain custody of children by virtue of their wrongful removal" and the Convention "provides a sound treaty framework to help resolve the problem of international abduction ...." 42 U.S.C. § 11601(a)(2),(4). ICARA "implement[s] ... the Convention in the United States." *Id.* § 11601(b)(1).

The "central operating feature" of the Convention is the "return remedy." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010). The return remedy is "a 'provisional' remedy because it does not dispose of the merits of the custody case—additional proceedings on the merits of the custody dispute are contemplated in the State of the child's habitual residence once the child is returned there." Linda Silberman, *Interpreting the Hague Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005).

The objectives of the Convention and return remedy are "several-fold." *Id.* First, return of the child

"reverses the abduction," thereby "mitigating the psychological trauma"[1] of abduction experienced by the child. *Id.* (internal citation omitted). Second, return of the child "facilitates an underlying premise of the Convention"—that the child's State of habitual residence "is the appropriate place" to adjudicate custody, because it is "where the child and the family have lived and where much of the evidence about what will be in the best interests of the child will be located." *Id.* Third, return "deter[s] future abductions" by sending a clear message "that wrongfully removing a child to another country will not give the abductor" a legal or tactical advantage. *Id.* Thus, the return remedy "is both remedial and preventive." *Id.*

From the Preliminary Draft of the Convention, United States delegates "identified and foresaw two problem areas that continue to plague the Convention—the time frame for bringing a return action and the exceptions to return." *Id.* at 1051 (citing Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99 (1980)). With respect to the former, delegates emphasized the Convention may "not serve its purpose of deterring parental kidnapping," Bodenheimer, 14 FAM. L.Q. at 110, absent the adoption of measures to account for the fact that, in the United States, "the aggrieved parent will often be unable to find the child, or determine the proper court for bringing the action, within the one-year time period ...." *Id.* at 109.

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[1] As the Court observed in *Abbott* v. *Abbott*, 130 S.Ct. 1983 (2010), some child psychologists consider parental abduction "one of the worst forms of child abuse." 130 S. Ct. at 1996.

These "concerns were prescient, and these issues have turned out to be of significant contemporary importance in the operation of the Convention today." Silberman, 38 U.C. DAVIS L. REV. at 1051.

A. Articles 12, 18, and 34 & the Settled Inquiry.

The Preliminary Draft of the Convention required "return of the child forthwith" where a petition for return is filed within six months of a breach of custody rights, and extended that period to one year "where the residence of the child was unknown." Prel. Doc. No. 6 of May 1980, in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6–25,1980, *Actes et Documents de la Quatorzième Session: Child Abduction*, 168 (1982) [hereinafter "*Actes et Documents*"].[2] The Preliminary Draft also provided for return after one year through Article 15,[3] which stated:

> The provisions of this Chapter do not limit the power of judicial or administrative authorities to order the return of the child after the expiration of the time-limits set out in article 11.

Id. at 169.

Numerous States commented on these aspects of the Preliminary Draft. *See* Prel. Doc. No. 7 of September 1980, "Comments of the Governments on Preliminary Document No. 6," *Actes et Documents*,

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[2] Article 12 was denominated as Article 11 in the early drafts of the Convention.

[3] Article 15 became Article 18.

215. Germany proposed extending the one-year period to two years because it would "not be too difficult to conceal the child's place of abode for a year." *Id.* at 216. Australia also advocated for extensions of the time periods, *id.* at 218, while Canada observed that the discretion to be granted judges under Article 15 "to order the child's return," notwithstanding the time limits in Article 11, "might prove useful" in cases where the child's location was concealed. *Id.* at 232.

The United States was "perturbed about [the] extremely restrictive time-limits," observing that, "[a]s a practical matter," it might prove impossible "to locate a child and to bring proceedings in an appropriate court within these limits." *Id.* at 242. It emphasized that "[t]his is particularly true in large federated States such as the United States, which also has no requirement for persons to register upon establishing or changing their address." *Id.*

Terming each of the proposed time periods a "statute of limitations," the United States warned that "rather than deterring abductions," the proposed approach would "benefit those abductors who have the ... means and the aid of relatives or friends ... to avoid detection." *Id.* It also observed that discussions with mental health professionals "indicate that there is serious doubt" that a child's integration into a new environment within a year is such that "it would be contrary to their interests to be returned thereafter." *Id.*

At the Fourteenth Session of the Hague Conference in October 1980, the United States formally proposed that, "at the very least," the time limits be extended to one-year and two-year periods. Working Document No. 20, *Actes et Documents*, 274. During the course of

negotiating the limitations period, the United States repeatedly expressed concern about the practical operation of such periods in the United States. *See Procès-verbal 6*, *Actes et Documents*, 288 (stating that "[i]t might prove impossible to locate a child within a certain period of time" in the United States); *see also Procès-verbal* 7, *Actes et Documents*, 292 (observing practical consequences of short time periods, including the difficulties and disadvantages faced by left-behind parents lacking legal assistance and those trying to locate their children). On October 13, 1980, the delegates voted to adopt a single one-year period for Article 11 and to delete the second paragraph of Article 11 accounting for "discovery" of the child. *Procès-verbal* 7, *Actes et Documents*, 291–93.

As part of these discussions, however, delegates established that Article 15 provided flexibility to account for the concerns that had been raised by the United States and others. The United Kingdom stated that courts maintain the power to "enforce a request for the child" after one year. *Id.* at 295. The United States interpreted Article 15 as allowing authorities to "use whatever proceedings or powers they possessed in domestic law" in addition to those in the Convention. *Id.* The Israeli delegation was "unhappy with the one-year period" under Article 11 and proposed changes to Article 15 to clarify "that the Convention would apply after expiration of the time period and that other rules not connected with the Convention were not precluded." *Procès-verbal 10*, *Actes et Documents*, 315. Thus, Article 15 (now Article 18) was distributed by the Drafting Committee on October 22, 1980. It read:

> The provisions of this Chapter do not limit the power of a judicial or administrative

> authority to order the return of the child at any time.

Working Document No. 75, *Actes et Documents*, 350. When discussing this proposal on October 23, 1980, Canada emphasized that "it had been the unanimous view of the Drafting Committee that [A]rticle 18 be written in the broadest possible terms, in order to allow the immediate return of a child within or without the terms of the Convention, at any time." *Procès-verbal 17*, *Actes et Documents*, 371–72.

The delegates also then discussed Working Documents No. 76 and 78,[4] which provided that the Convention "shall not restrict the application of ... other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained." Working Document No. 76, *Actes et Documents*, 363; Working Document No. 78, *Actes et Documents*, 368. These proposals broadened the power available under what had been denominated as Article V, which originally was designed to govern only the relationship between the Convention and other treaties. *See* Prel. Doc. No. 6, *Actes et Documents*, 170 (stating in Preliminary Draft that Article V would address "[r]elations with other Conventions" and "be decided by the Fourteenth Session."). The Japanese delegation expressed that Article 34 should not be understood to permit States to use "internal law in order to obstruct the operation" of the Convention, *Procès-verbal 16*, *Actes et Documents*, 365, or apply "less favourable" law to "evade the purposes" of the Convention. *Procès-verbal 18*, *Actes et Documents*, 383. The

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[4] Working Documents No. 76 and 78 became Article 34.

Chairman assured the delegates that "the 'other law' concerned should be consistent with the purposes of the Convention." *Id.*

On October 24, 1980, Articles 12, 18 and 34 were read and adopted in their current form. *Procès-verbal 4, Actes et Documents*, 409–10.

Commentary by the Reporter of the Convention observes that Article 18 was seen as likely to be particularly useful in countering situations "where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment." Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law, Actes et Documents*, ¶ 112, 460 [hereinafter "Explanatory Report"].[5]

The Explanatory Report also emphasizes that the Convention is not designed to operate in isolation but

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[5] The Court has "not decide[d] whether [the Explanatory Report] should be given greater weight than a scholarly commentary." *Abbott*, 130 S. Ct. at 1995. While the State Department has characterized it as the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention," Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986), JA-72, the Court has noted the Report itself acknowledges it "has not been approved by the Conference, and it is possible that, despite the Rapporter's [sic] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective." *Abbott*, 130 S. Ct. at 1995; Explanatory Report, at ¶ 8, 427–28.

instead depends on the legal rules of a State considering return, observing that:

> even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child ....

Explanatory Report, at ¶ 39, 436 (citing Article 34).

II. Statement of Facts.

1. Petitioner Manuel Jose Lozano and Respondent Diana Lucia Montoya Alvarez both immigrated to England from Colombia. Pet. App. 44a. After dating, they began co-habitating in London during 2004. *Id.* Throughout their relationship, Lozano worked two jobs as a custodian. *Id.* Alvarez was employed sporadically and received incapacity benefits based on a depression diagnosis. *Id.*

On October 21, 2005, Alvarez gave birth to their daughter. 2d Cir. App. A-722. In 2006, the Parties obtained a loan in Alvarez's name to buy a flat in Colombia, but the money was lost when transferred to Colombia. Pet. App. 46a. They pursued a lawsuit to recover the money. *Id.* In November of 2008, shortly after their daughter's third birthday, Alvarez traveled to New York "to visit her sister Maria and attempt to gather evidence to support Respondent's and Petitioner's case regarding the problematic loan." *Id.* at 55a (citing 2d Cir. App. A-339 (Lozano testimony), 2d Cir. App. A-387–88 (Alvarez testimony)). Their daughter remained at home in

London with Lozano and her grandmother—Lozano's mother—who was visiting from Colombia. Pet. App. 55a.

On November 19, 2008, shortly after returning to London,[6] Alvarez "left to bring the child to nursery school and never returned." *Id.*

As the district court noted, Lozano did not stand idly by; he pursued "a multitude of channels ... in an attempt to find his child." *Id.* at 58a. Indeed, the court acknowledged that Lozano "was not only diligent, but remarkably diligent" in trying to locate his daughter. 2d Cir. App. A-632. After Alvarez and the child failed to return home, Lozano called Alvarez's sister Gloria—who also lived in London and with whom Alvarez frequently spoke and visited—and implored her to advise him of their whereabouts. *Id.* at A-242–43. She denied any knowledge of their whereabouts. *Id.*

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[6] At the district court—validating the wisdom of the Convention's premise that the State of habitual residence "is the appropriate place" to adjudicate custody because it is "where ... the evidence will be located"—there was conflicting and unresolved evidence as to whether Lozano had moved out earlier. Lozano testified that, upon returning to London, Alvarez requested he and his mother leave the home, Pet. App. 55a, and that he found a new apartment and moved approximately ten days later. 2d Cir. App. A-241. Alvarez testified she abducted the child before Lozano moved out. Pet. App. 55a. It appears this is another point about which "[t]here is insufficient independent evidence to fully corroborate either Party's version of the events." *Id.* at 47a (concluding same as to reasons Alvarez was not employed outside the home at certain times).

On or about the morning of November 21, 2008, while driving to work, Lozano briefly spotted Alvarez, who fled. *Id.* at A-243. He telephoned Alvarez, who answered, refused to disclose her whereabouts, claimed she had filed a police report, and hung up. *Id.*

The following day, Lozano and his mother sought help from local law enforcement at the South Harrow police station. *Id.* After explaining that his child was missing and that Alvarez claimed to have filed a complaint against him, the police informed Lozano they had no records of any such complaint. *Id.* at A-243–44. The police further informed Lozano that Alvarez and the child "had not left the country and that [the police] were keeping in regular contact with her." *Id.* at A-139. Unbeknownst to Lozano, beginning on or about November 24, 2008, Alvarez and the child had taken residence at a shelter in London, Croydon Women's Aid ("Croydon"). Pet. App. 57a; 2d Cir. App. EXH-192.

2. Lozano sought assistance from the Citizens Advice Bureau in London, which referred him to Family Mediation. Pet. App. 58a. Over the next several weeks, Family Mediation "sent several letters to Respondent without response," at which point Family Mediation referred Lozano to legal aid solicitors in London. *Id.*

On or about December 14, 2008, Alvarez's sister Nancy called Lozano and threatened that he should stay away from his daughter and Alvarez if he did not "want trouble" or "to be sorry." *Id.* at 56a. Minutes later, Alvarez's other sister, Gloria, telephoned Lozano, stated that she was "very sorry for what happen[ed]," 2d Cir. App. A-246, and reported that Alvarez wanted access to the family home to remove

belongings. *Id.*; Pet. App. 56a. Lozano replied that Alvarez could retrieve her belongings, though neither Alvarez nor anyone else ever did so. 2d Cir. App. A-246.

Following these calls, Lozano's solicitors, Duncan & Lewis, advised him that they should focus efforts on locating Alvarez, *id.* at A-247, and Lozano should "refrain from speaking [further] with any member of Respondent's family." Pet. App. 57a. Lozano expressed concern that Alvarez could be in New York with her sister because she had recently visited the United States in November 2008. 2d Cir. App. A-247. Lozano's suspicions were wrong at the time, however; Alvarez remained in London. Pet. App. 57a–58a. Lozano's solicitors established communication with Alvarez's solicitors, Amphlett Lissimore, and thereafter endeavored "to negotiate an agreement in relation to contact." 2d Cir. App. A-121. On March 27, 2009, Alvarez's solicitors wrote to Lozano's solicitors, stating that Alvarez would not allow Lozano any contact with his daughter. JA-179; 2d Cir. App. A-247–48.

Alvarez extended their tenancy at Croydon through May 2009, 2d Cir. App. A-361–62, at which point Alvarez requested, and the Latin American Women's Rights Service provided, a letter "to support her application for permanent accommodation ... to start a new life with more stability" in London. Pet. App. 57a; 2d Cir. App. EXH-221. Later that month, Alvarez "applied for permanent housing" in England. Pet. App. 47a.

On July 23, 2009, Lozano's solicitors filed an application under the Children Act of 1989 "to have regular and frequent contact with his [daughter], in order to ensure that [she] is well and has a healthy

and balanced life" and "to obtain a prohibited steps order to prevent [Alvarez] from removing the child from the jurisdiction without his knowledge." JA-227; Pet. App. 58a; 2d Cir. App. A-251, A-731. In this application, Lozano expressed concern that Alvarez might abduct his daughter to Colombia or the United States. JA-226. Contemporaneously, Lozano's solicitors filed applications for orders, pursuant to § 33 Family Law Act of 1986 (the "Family Law Act"), seeking disclosure of his child's whereabouts from: (i) Dr. Siddiqui, the child's doctor; (ii) the Child Benefit Office of Newcastle-upon-Tyne; and (iii) Alvarez's sister, Gloria Montoya Alvarez. JA-228–31.

On September 16, 2009, Lozano's solicitors applied for additional orders under the Family Law Act, seeking disclosure of his child's whereabouts from Amphlett Lissimore. JA-248–49.

On October 13, 2009, the Family Division of Her Majesty's Courts Service ("Family Court") reported to Lozano's solicitors that: (i) Amphlett Lissimore reported Alvarez was last known to be at the Croydon address, in May 2009, but "had moved on"; (ii) the Child Benefit Office had the same address on record; (iii) Alvarez's sister Gloria claimed "no knowledge of the whereabouts of her sister or the child"; and (iv) Dr. Siddiqui's records contained only the address of the family home. JA-255.

On November 20, 2009, Lozano's solicitors applied for additional orders under the Family Law Act, seeking disclosure of his child's whereabouts from the Northwood Police Station. JA-261–62.

On January 26, 2010, the Family Court reported to Lozano's solicitors that "[t]he Metropolitan Police ... have no information which they can give

you." JA-262. The court also reported that "H.M. Revenue and Customs and Amphlett Lissimore Solicitors have no information apart from [the Croydon address]." *Id.* The court also reminded Lozano's solicitors that the English court had scheduled a "further hearing for 14th April 2010." *Id.*

On February 22, 2010, the Family Court confirmed to Lozano's solicitors that H.M. Revenue & Customs' records revealed no new information. JA-268–69.

3. Lozano and his solicitors then came to believe that Alvarez had surreptitiously removed the child from England. JA-174 (observing "[n]one of the parties served" with disclosure orders "have details of the ... child's whereabouts" and Alvarez thus was "suspected to have wrongfully removed the child from the UK to Manhattan, NY").

Unbeknownst to Lozano, while he had continued to search for his daughter through the United Kingdom's administrative, law enforcement, and judicial systems, Alvarez had removed the child from England to France on July 3, 2009. Pet. App. 58a; 2d Cir. App. A-362 (Alvarez testimony). On July 8, 2009, again unbeknownst to Lozano, Alvarez took their daughter from Paris to New York, where they have since lived. Pet. App. 58a; 2d Cir. App. A-363.

4. On March 15, 2010, Lozano promptly filed an Application with the Central Authority for England and Wales to determine if his daughter had been removed from the United Kingdom. JA-169–273; Pet. App. 59a. After the International Child Abduction and Contact Unit (of the Central Authority for England and Wales) sent that application to the United States Department of State Office of Children's Issues, JA-165–273, the State Department

confirmed that Alvarez had entered the United States. The Department of State did not disclose the child's location to Lozano[7] but endeavored to facilitate locating pro bono counsel to represent Lozano in the United States, which resulted in the undersigned counsel undertaking Lozano's cause on July 27, 2010. 2d Cir. App. A-632. By this time, the one-year period under Article 12 had already run.

On August 4, 2010, the Department of State provided Lozano's United States counsel[8] with the most recent known address of Alvarez and Lozano's daughter. In response to the State Department's routine warning that the abducting parent may have fled from that last known address or might be a flight risk, Lozano's counsel immediately retained a private investigator to confirm that Alvarez and their daughter remained at the address. *See* NCMEC

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[7] There is no evidence that Lozano had the address at the time he applied to the UK Central Authority in March of 2010, nor is there evidence that the State Department ever provided Lozano with the address or jurisdiction within which Alvarez was residing. To the contrary, the fact that the Agreed Confidentiality Order negotiated by Alvarez's counsel and entered by the district court prohibited (and continues to prohibit) disclosure of "anything that would identify or suggest in any way, either directly or indirectly, Respondent's or the minor child's current location," 2d Cir. App. A-209–11, would have been unnecessary if Lozano had the address during the operative period.

[8] *See* NCMEC Training Manual, *Litigating International Child Abduction Cases Under the Hague Convention*, 4, 93–96 (2012) (observing that counsel is provided with the full file only after an engagement letter is formalized.)

Training Manual, *Litigating International Child Abduction Cases Under the Hague Convention*, 92–93 (2012) (observing: (i) information might become "stale" in the interim between the State Department's investigation and the retention of counsel; (ii) "it therefore is best" for attorneys to verify the child's whereabouts after the State Department completes its investigation, confirming, at a minimum, the presence of the child in the jurisdiction; and (iii) involving law enforcement might alert an abducting parent of the investigation). Only in October 2010—with the assistance of the U.S. Department of State, a private investigator, and retained counsel—was Lozano able to discern the specific location of the child within the United States in order to file in the jurisdiction "where the child is." Art. 12.

A. Procedural History.

1. After confirming the child's location, Lozano filed a Petition for Return of Child in the United States District Court for the Southern District of New York on November 10, 2010. Pet. App. 40a.

Alvarez conceded that her removal of the child from England was wrongful under the Convention, *id.* at 78a–80a, but objected to return on two grounds: that returning to London would pose a grave risk of harm to the child,[9] and that, with more than one year having passed since her wrongful abduction, the child was now "settled" in the United States such that return was improper. *Id.* at 81a.

On April 29, 2011, the district court denied Lozano's petition in an oral order. 2d Cir. App. A-

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[9] The district court rejected this defense. Pet. App. 89a–92a.

708–78. The district court "conclude[d] that the child was a habitual resident of the United Kingdom," Pet. App. 79a, and that Alvarez had wrongfully removed the child. *Id.* at 78a. Nonetheless, the district court found that the courts of England—the child's place of habitual residence—were not the proper authority to adjudicate custody rights because, during the sixteen months between abduction and filing of the petition, as a result of her experiences between the ages three-and-a-half to five years, she had become too "settled" in the United States to permit her return to an English court to adjudicate custody. *Id.* at 111a.

In reaching these conclusions, the district court rejected Lozano's argument that, based on principles of equitable tolling, it should decline to entertain the "settled" argument. *Id.* at 99a. The district court held that "[t]he one-year period is not a statute of limitations and, therefore, is not subject to equitable tolling," *id.*, and, even if tolling were available, it would not apply here because Alvarez's concealment of the child was not "egregious." *Id.* at 103a–04a. Finally, the district court declined to otherwise exercise its discretion to order the child returned because, although Lozano was "diligent in searching for" his abducted daughter, his efforts "do not outweigh the child's interest in remaining in her current, stable environment." *Id.* at 112a. The court concluded that, "[e]ven though ... the child would not be at a grave risk of harm if returned, ... such a move, at this time, would be *difficult* for the child." *Id.* at 112a–13a (emphasis added).

The court "acknowledge[d] that this outcome is in many ways unfair to" Lozano and, due to the illegal immigration status of Alvarez and the child, would

"disadvantage" Lozano's ability to have "a meaningful relationship with his child." *Id.* at 114a n.21.

On May 27, 2011, Lozano filed a timely notice of appeal from the district court's denial of his petition. JA-11 (Dkt No. 42). On August 22, 2011, the district court issued a written opinion. JA-14–15 (Dkt No. 46).

2. Before oral argument, by letter dated July 11, 2012, the Second Circuit requested the Secretary of State's views concerning, *inter alia*, "whether the one-year period before a party can raise the 'now settled' defense in Article 12 ... is susceptible to equitable tolling." Pet. App. 12a. On August 20, 2012, the United States submitted a memorandum brief as *amicus curiae*. *Id.* at 170a–93a. The United States asserted that "Article 12 ... permits the court to forgo the 'settled' inquiry when the court concludes facts justify return regardless ...." *Id.* at 179a; *accord id.* ("where [the abducting] parent's behavior is so egregious ... a court may order a child's return without determining whether the child is now settled"); *id.* (court is empowered "to make the antecedent determination whether a 'now settled' inquiry is necessary" at all). The United States argued that the court's determination of whether to forgo the "settled" inquiry must turn on "equitable discretion," not "equitable tolling," because: (i) "equitable tolling would entirely preclude district courts, *once they have concluded that equitable tolling is appropriate*, from considering whether the child is settled," *id.* at 177a (emphasis added), and the one-year period is not a statute of limitations. *Id.* at 176a.

3. The Second Circuit affirmed the decision of the district court, reasoning that "the one-year period in

Article 12 was designed to allow courts to consider a child's interests in remaining in the country into which she has been abducted after a certain time has passed," *id.* at 23a–24a, and that "allowing equitable tolling of the one-year period would undermine its purpose." *Id.* The court of appeals did not explain how using traditional principles of equitable tolling would undermine this purpose, yet making that same determination using "equitable discretion" would not.

The court of appeals also found that equitable tolling cannot apply because the one-year period under Article 12 does not operate "as a statute of limitations." *Id.* at 27a. The petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

Equitable tolling is available with respect to the one-year period under Article 12. The Convention expressly provides that a left-behind parent may invoke domestic law and legal rules for purposes of obtaining the return of an abducted child. Equitable tolling is a well-established part of the law and legal rules of the United States, presumptively available with respect to every federal statute of limitations. The one-year period under Article 12 is a statute of limitations. *Young* v. *United States*, 535 U.S. 43 (2002). After one year, the left-behind parent's right to automatic return of the child expires. That the parent still may obtain the child's return under the Convention or domestic law after one year does not change the fact that the period is a statute of limitations. Where, as here, the Petitioner diligently pursued his rights but extraordinary circumstances prevented him from filing within one year, equitable tolling applies.

The Second Circuit held that equitable tolling is "unnecessary" because a court retains "equitable discretion" to return a child at any time. While the State Department asserts that this discretion necessarily includes the power to forgo altogether the settled analysis, it is not necessary for the Court to decide that issue. Even if a court possesses equitable discretion to decline to consider the abducting parent's claim that the child is settled, that is insufficient to rebut the presumption that equitable tolling is available as to the one-year period.

The State Department similarly asserts that equitable tolling disrupts the framework of the Convention insofar as, when its elements are satisfied, it results in the court not reaching the settled question. Yet, as the State Department describes, "equitable discretion" also permits a court not to reach the settled question.

"Equitable discretion" undermines the Convention's objects and purposes. It allows abducting parents to benefit from the fruits of their wrongdoing: They can establish settlement based on the period during which they concealed the child's whereabouts and prevented timely filing, so long as their concealment is "effective" but not "extreme." Moreover, equitable discretion lacks the well-defined and familiar framework of equitable tolling, which courts can and do apply with predictability, an essential element to further the Convention's objective of deterring abductions in the first instance. In short, equitable tolling tells abducting parents: "If you abduct your child to the United States and conceal your whereabouts, you will *not* benefit from the misconduct." Equitable discretion sends the message: "You probably will."

Among Contracting States, no court of last resort substantively has addressed whether equitable tolling is available. At least one foreign court has embraced the concept of equitable tolling. Several lower or intermediate foreign courts have declined to do so. The common denominator among the foreign court decisions is that, consistent with Article 34, States have applied legal rules and methods from within their own existing domestic law to address the issue of concealment.

If the Court finds that equitable tolling is available, it should direct that *Pace*, 544 U.S. at 418, govern the question of whether it applies in a particular case. If the Court finds that equitable tolling is not available, it nonetheless should direct that the elements set forth in *Pace* be a necessary part of a court's exercise of equitable discretion. Such predicability is necessary to achieve the purpose and objective of deterring abduction and concealment.

ARGUMENT

I. Under the Text of the Convention, the Common Law Doctrine of Equitable Tolling Should Be Available to a Left-Behind Parent with Respect to the One-Year Period Under Article 12 in the United States.

Article 12 of the Convention mandates that, subject to certain defenses inapplicable here, a court order return of a wrongfully removed child if "at the date of the commencement of the proceedings before the judicial or administrative authority ... where the child is, a period of less than one year has elapsed from the date of the wrongful removal ...." Art. 12. When a petition for return is filed more than one year after

the child's wrongful international removal, "[t]he judicial or administrative authority ... shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Id.*

A. The Convention Admits the Application of Domestic Law and Legal Rules That May Expand Application of the Return Remedy, and So Allows for Equitable Tolling of Article 12's One-Year Period in the United States.

1. In drafting the Convention, the Hague Conference was "aware of the profound differences which existed as regards the internal organization of the Contracting States." Explanatory Report, at ¶ 45, 438. While the Convention is "autonomous as regards existing conventions concerning the protection of minors," *id.* at ¶ 38, 436, "[t]his autonomous character does not mean that the provisions" are autonomous from the domestic law of a Contracting State. *Id.* at ¶39, 436.

Article 34 explicitly provides that the "Convention shall not restrict the application of ... law of the State addressed for the purposes of obtaining the return of a child ...." Art. 34. Thus, as the Explanatory Report emphasizes, the Convention "explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, *any other legal rule* which may allow him to obtain the return of a child wrongfully removed ...." Explanatory Report, at ¶ 39, 436 (emphasis added); *id.* ("The Convention must necessarily coexist with the rules of each Contracting State ...."); *cf.* Elisa Pérez-Vera, Special Commission Report, *Actes et Documents*, ¶ 48, 186 (recommending that the draft Convention "admit[] of the use

of ... procedures prescribed by the internal law of any Contracting State, if they can facilitate the restitution of an abducted child"); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. OF INT'L L. & POL. 221, 247 (2000) (noting Convention proceedings "are dependent upon national law ... in place in any particular country"); Silberman, 38 U.C. DAVIS L. REV. at 1073 (observing the Convention "framework creates room for domestic interests to operate") (internal quotations omitted).

2. Exemplifying the application of domestic law to return a wrongfully removed child, the courts of some States have applied the Convention to facilitate or expand the return remedy—even when doing so is beyond the plain text of the Convention.

For example, Article 4 provides that the Convention "shall cease to apply when the child attains the age of 16 years." Art. 4. Yet the courts of some States have established that, as a matter of domestic common law, the return remedy under the Convention continues to be available even after a child reaches age 16. *See* Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Permanent Bureau of the Hague Conference on Private International Law) (1989), at ¶ 12. Notably, in addressing this issue, the Permanent Bureau of the Hague Conference concluded that "while Article 4 makes it clear that the obligation to apply the Convention ceases ... when the child reaches [age 16], nothing in the Convention prevents [a] State[] from applying the Convention's mechanisms *under its own laws*" to order return even where the child has

reached the age of 16. *Id.* (emphasis added). Thus, the Permanent Bureau has endorsed application of internal law by judicial authorities to expand the return remedy beyond the plain text of the Convention.

Similar to States ordering return regardless of Article 4, the common law doctrine of equitable tolling is a domestic rule in the United States that complements and furthers the objectives of the Convention and ICARA. As this Court has held, in the United States, "it is hornbook law that limitations periods are 'customarily subject to equitable tolling,' ... unless the tolling would be 'inconsistent with the text of the relevant statute[.]'" *Young*, 535 U.S. at 49 (internal citation omitted) (quoting *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990), and *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)). *See also Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (a "nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling'") (emphasis omitted).

The primary purpose of the Convention is to protect children from international abduction by (i) returning an abducted child for adjudication of custody rights and (ii) deterring child abductions. *Abbott*, 130 S. Ct. at 1996–97. As the United States has described, the "animating principles" of the Convention are "[d]eterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent ...." Cert Br. of Amicus Curiae United States 11. Equitable tolling fulfills these principles by "depriv[ing] [the abducting parent's] actions of any practical or juridical consequences." Explanatory

Report, at ¶ 16, 429.[10] The doctrine of equitable tolling is "centuries old," *McQuiggen* v. *Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting), well-defined, and predictable, which are characteristics necessary to further the Convention's objective of deterring abduction in the first instance. "Equitable discretion" lacks these characteristics, leaving open the distinct possibility that concealment will yield such "tactical advantages" and favorable "juridical consequences" for the concealing abductor. As such, equitable discretion lacks the deterrent effect of equitable tolling. *See infra*, pp. 44–45.

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[10] Lozano has followed the practice of the courts of appeals and the State Department by using the term "equitable tolling." *See, e.g.*, *Furnes* v. *Reeves*, 362 F.3d 702, 723 (11th Cir. 2004), *cert. denied*, 543 U.S. 978 (2004); *In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009). Some circuit and other courts have distinguished between "equitable tolling" and "equitable estoppel." *Compare, e.g.*, *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (referring to tolling when defendant conceals existence of plaintiff's cause of action as a special instance of "equitable estoppel"), *with C.M. English* v. *Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (holding that appropriate term when defendant conceals existence of plaintiff's claim is "equitable tolling"), *cert. denied*, 486 U.S. 1044 (1988). The Court has not found it necessary to parse these distinctions in nomenclature, nor is it necessary to do so here, for this Court has long recognized the general equitable principle—regardless of the specific term used—that a limitations period does not run when a plaintiff, "without any fault or want of diligence or care on his part," is unaware that he has a claim to assert. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946).

B. The One-Year Period Under Article 12 Is a Statute of Limitations, and So Is Subject to Equitable Tolling.

1. Thirty-three years ago, at the outset of negotiations of the Hague Convention, the United States denominated the periods under what is now Article 12 as a "statute of limitations." Prel. Doc. No. 7, *Actes et Documents*, 242 (objecting to the short "statute of limitations" in the Preliminary Draft of the Convention). Around the same time, Professor Brigitte Bodenheimer, a principal United States delegate to the Hague Conference, similarly described the Preliminary Draft of the Convention as providing "an extremely short *statute of limitations* for filing a return action in court." Bodenheimer, 14 FAM. L.Q. at 106 (emphasis added). *Accord* Legal Analysis, JA-98 (observing that Article 12 places "time limitations on the return obligation").

2. In 2006, as part of the Special Commission's review of the operation of the Hague Convention, the United States again characterized the one-year period under Article 12 as a "statute of limitations." Pet. App. 167a–68a.

Specifically, Question 67 of the Questionnaire invited States to comment on "matters which they may wish to raise concerning the practical operation of the 1980 Convention." *Id.* at 169a. The United States responded that it "supports the concept of equitable tolling" as to Article 12 and incorporated by reference its lengthier response to Question 13(f),[11]

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[11] Question 13(f) of the Questionnaire requested that each Contracting State report on "important developments" relating to "the one year period" under Article 12. Pet. App. 167a.

which explained that "[t]he U.S. Supreme Court has stated that, unless Congress states otherwise, equitable tolling should be read into every federal *statute of limitations*." *Id.* at 167a–69a (emphasis added) (citing *Young*, 535 U.S. at 49).

3. The Court's analysis in *Young* further supports that Article 12's one-year period is a statute of limitations. In *Young*, the Court considered whether a "three year lookback" period under the Bankruptcy Code can be equitably tolled during the pendency of a prior bankruptcy petition. 535 U.S. at 44.[12] The Court held it a limitations period because it "prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced." *Id.* at 47. The Court also found that the lookback period served the same general purposes as a statute of limitations since it

> encourages the IRS to protect its rights ... before three years have elapsed. If the IRS sleeps on its rights, its claim loses priority and the debt becomes dischargeable. Thus, ... the lookback period serves the same "basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."

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[12] If the IRS has a claim for taxes for which the return was due within three years before a bankruptcy petition was filed (including extensions), the claim enjoys eighth priority under 11 U.S.C. § 507(a)(8)(A)(i) and is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(1)(A). *Young v. United States*, 535 U.S. 43, 45–46 (2002).

Id. at 47 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000)).

Like the lookback period, Article 12's one-year period provides certainty about the opportunity for recovery, plainly prescribing the period within which the Convention grants a left-behind parent the right to automatic return (absent the existence of certain limited defenses). *See* Explanatory Report, at ¶ 106, 458 ("Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities ... are obliged to order its return."). The one-year period also "eliminates stale claims" in that it marks the admittedly arbitrary point in time where the Convention's drafters determined the right of left-behind parents to automatic return ceases.

Significantly, *Young* held that the lookback period was subject to equitable tolling even though it, "unlike most statutes of limitations, ... bars only *some*, and not *all*, legal remedies." 535 U.S. at 47. The Court concluded this characteristic meant merely that it was "a more limited statute of limitations, but a statute of limitations nonetheless." *Id.* at 48; *id.* at 47 n.1 (observing that statutes of limitations may bar legal remedies, but not certain equitable remedies).

The same conclusion applies to Article 12's one-year period. Expiration of Article 12's one-year period bars "some," though "not all, legal remedies," *i.e.*, it bars the automatic return of the child, but other "[e]quitable remedies may still be available." *Id.* at 47 n.1. So, while the district court correctly observed that a petition for return of the child is not "barred" if it is filed outside the one-year period, Pet. App. 99a, it does not follow that the one-year period is not a statute of limitations subject to equitable tolling.

C. The Availability of Equitable Tolling as to Article 12's One-Year Period Is Consistent with the Text of the Convention.

1. Equitable tolling is consistent with the text of the Convention because Article 34 explicitly admits "the application of ... law of the State addressed for the purposes of obtaining the return of a child ...." Art. 34. *See* Explanatory Report, at ¶ 39, 436 (highlighting the Convention "explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, *any other legal rule* which may allow him to obtain the return of a child wrongfully removed ....") (emphasis added); *id.* ("The Convention must necessarily coexist with the rules of each Contracting State ...."). *See also* Silberman, 33 N.Y.U. J. OF INT'L L. & POL. at 247 (noting Convention proceedings "are dependent upon national law ... in place in any particular country"); Silberman, 38 U.C. DAVIS L. REV. at 1073 (explaining the Convention "framework creates room for domestic interests to operate").

The common law doctrine of equitable tolling is a "legal rule" of the United States. *See* Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Permanent Bureau of the Hague Conference on Private International Law) (1989), at ¶ 12 (endorsing common law expansion of Article 4 to permit return even where child has reached age 16). Where the factual circumstances satisfy the elements for tolling, its application will, consistent with Article 34, allow the left-behind parent to obtain return.

2. The equitable nature of proceedings under the Convention makes it particularly appropriate to subject the one-year period to equitable tolling. The Convention's text grants judicial and administrative authorities substantial equitable powers to order the return of abducted children at any time. Art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."); *see also* Art. 34 (providing for application of domestic law and legal rules). As both the State Department and Second Circuit acknowledge, equitable principles govern the Convention generally and Articles 12 and 18 in particular. *See* Pet. App. 175a–76a ("[A] district court retains equitable discretion at all times to consider all factors and order that a child who is now settled should nonetheless be returned."); *id.* at 27a (finding "the Convention expressly provides ... discretion to order the return of a child").

The presumption that equitable tolling is available is strongest in those areas of law "where equity finds a comfortable home." *Holland*, 130 S. Ct. at 2561; *see also id.* at 2560 ("[T]he presumption's strength is reinforced by the fact that equitable principles have traditionally governed the substantive law of habeas corpus.") (internal quotations omitted); *Young*, 535 U.S. at 50 (holding presumption favoring equitable tolling "doubly true" with respect to limitations periods applied by bankruptcy courts, "which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'") (quoting *Pepper* v. *Litton*, 308 U.S. 295, 304 (1939)). *Compare United States* v. *Brockamp*, 519 U.S. 347, 352 (1997) (barring application of equitable tolling to limitations periods under the Tax Code because, *inter alia*, "[t]ax law, after all, is not normally characterized by case-

specific exceptions reflecting individualized equities").

3. The fact that Article 18 recognizes "the power ... to order the return of the child at any time," Art. 18, does not preclude equitable tolling or render it unnecessary. The limitations period considered in *Holland* included an express exception in the form of a discovery rule. 130 S. Ct. at 2561–62 (noting AEDPA's limitations period starts no earlier than "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). The Court there rejected the argument that the exception precluded equitable tolling, noting that, while the statute expressly states when the period starts, it is silent as to when that period may be tolled. *Id.*; *see also McQuiggin*, 133 S. Ct. at 1933 (2013) (recognizing "equitable exception" to AEDPA's limitations period in addition to the expressly provided discovery rule and equitable tolling having been found available in *Holland*); *Young*, 535 U.S. at 53 (rejecting claim that "express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period").

4. The propriety of subjecting the one-year period to equitable tolling is supported also by the distinct attributes of the Convention's implementation in the United States. The United States is a "large federated State" that "has no requirement for persons to register upon establishing or changing their residence," Prel. Doc. No. 7, *Actes et Documents*, 242, and where it is "not ... too difficult to conceal the child's place of abode for a year." *Id.* at 216. Compounding matters for left-behind parents, to

commence a proceeding here, a petitioner not only must determine that the child has entered the United States, but, per ICARA, also must determine the specific location of the child, in order to determine which court is "authorized to exercise its jurisdiction." 42 U.S.C. § 11603(b).[13] By contrast, as reflected in the country-specific information available on the State Department's International Parental Child Abduction website, it appears that in numerous other countries, a parent need not bring suit at all: The Contracting State where the child is located[14] and/or

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[13] The United States is also rather distinct in requiring that the Petitioner locate the child to a degree of precision commensurate with the number of federal Districts. *See, e.g., The Concentration of Jurisdiction, A Comment from the Permanent Bureau*, THE JUDGES' NEWSLETTER (Permanent Bureau of the Hague Conference on Private International Law), Summer 2002, at 71 (noting Australia concentrates jurisdiction into a single federal court); Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17–21 March 1997) (Permanent Bureau of the Hague Conference on Private International Law), at ¶ 46 (noting that Finland and Ireland, for example, provide specially designated courts); Report and Conclusions of the Special Commission Concerning the Hague Convention (27 September–1 October 2002) (Permanent Bureau of the Hague Conference on Private International Law), at ¶ 95 (noting other countries including Germany, France, and Hungary have concentrated jurisdiction in a limited number of courts).

[14] It appears these include: Australia, the Bahamas, Belgium, Bermuda, Burkina Faso, Costa Rica, Croatia, the Dominican Republic, El Salvador, France, Greece, Guatemala, Honduras, Hong Kong Special Administrative Region, Italy, Morocco,

a government-appointed attorney[15] representing the left-behind parent's interests commences proceedings promptly after the petitioner files an application with that State's Central Authority. *See* Child Abduction Country Information, prepared by the Bureau of Consular Affairs, Office of Children's Issues, U.S. Department of State, *available at* http://www.travel.state.gov/abduction/country/country_3781.html (last visited August 27, 2013). Had that been the case here, Lozano would have met the deadline. *See supra* Statement of Facts, pp. 15–17. In sum: (i) these "profound differences," Explanatory Report, at ¶ 45, 438; (ii) the Convention's express endorsement of using "other law of the State" to obtain return under the Convention, Art. 34; and (iii) the fact that United States common law presumes equitable tolling is available with respect to statutes of limitations show the need for, and propriety of, equitable tolling in the United States.

5. As in *Young*, equitable tolling of the period also is particularly appropriate here because it prevents litigants from taking advantage of a loophole that rewards bad-faith conduct. In *Young*, the Court observed that, absent tolling, the lookback period would allow parties to seek discharge of otherwise nondischargeable tax debts by filing a Chapter 13 petition, voluntarily dismissing that petition after the

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Panama, Portugal, Romania, St. Kitts and Nevis, South Africa, Turkey, and Venezuela.

[15] It appears these include: Austria, Bulgaria, Chile, Colombia, Costa Rica, Denmark, Ecuador, Hungary, Ireland, Latvia, New Zealand, Norway, Slovenia, Ukraine, the United Kingdom, and the Isle of Man (as part of the United Kingdom).

period lapses, and then filing a Chapter 7 petition. *Id.* at 46–47.

This Court has long recognized that tolling is warranted[16] when a defendant's misrepresentation caused the plaintiff to allow the limitations period to lapse. *E.g.*, *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235 (1959) (holding limitations period for Federal Employers' Liability Act ("FELA") claim subject to tolling if defendant's deception caused plaintiff's delay in filing complaint); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (holding same with respect to Federal Farm Loan Act).

Here, Lozano was "induced or tricked by [Respondent's] misconduct into allowing the filing deadline to pass." *Young*, 535 U.S. at 50 (quoting *Irwin*, 498 U.S. at 96); *see*, *supra*, II. Statement of the Facts, pp. 11–17. After remaining in England for a number of months and engaging solicitors who then communicated with Lozano's solicitors on custody issues, Alvarez surreptitiously removed the child from England—the act that triggered the start of the one-year period—and caused Lozano and his solicitors to continue searching in vain for his child in England, unaware that the period had begun to run. Alvarez then further concealed the child's location within the United States, delaying Lozano's filing of the petition.

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[16] Equitable tolling does not, however, *require* that a defendant herself cause or intend to cause the delay. *E.g.*, *Young*, 535 U.S. at 50 ("Tolling is ... appropriate regardless of petitioners' intentions ... whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period.").

These extraordinary circumstances beyond Lozano's control prevented him from filing within the one-year period. *See Holland*, 130 S. Ct. at 2566–67 (Alito, J., concurring) (circumstances "external" to petitioner warrant equitable tolling). Lozano "was not only diligent, but remarkably diligent" in trying to locate his daughter.[17] 2d Cir. App. A-632; *accord* Pet. App. 112a.

6. Nothing in the text of the Convention generally, or Article 12 in particular, is inconsistent with equitable tolling or militates against the presumption that equitable tolling should be available. When deciding whether the text of a statute is consistent with equitable tolling, the Court has looked to the length of the limitations period, the complexity of the definition of that period, and whether the period substantively limits the relief or remedy.

Article 12 provides a short one-year limitations period. *Holland*, 130 S. Ct. at 2561 (holding equitable tolling available with respect to one-year period); *cf. Beggerly*, 524 U.S. at 48–49 (finding "unusually generous" twelve-year limitations period militates against allowing equitable tolling, as did other need for certainty with respect to real property). Nor is Article 12 especially complex. *Holland*, 130 S. Ct. at 2561 (noting fact that limitations period "reads like an ordinary, run-of-the-mill statute of limitations" supports finding that equitable tolling is available); *cf. Brockamp*, 519 U.S. at 350–52 (rejecting tolling on grounds that included

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[17] Under *Holland*, the aggrieved party is required to demonstrate reasonable diligence, not maximum feasible diligence. 130 S. Ct. at 2565.

statute was "unusually emphatic," reiterating its limitation several times in several different ways, and "establishing special time limit rules" for various types of refunds such that reading equitable tolling "would work a kind of linguistic havoc"); *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 629 (2007) (declining to permit equitable tolling as to Title VII where, *inter alia*, it would "distort" the statute's "integrated, multistep enforcement procedure") (internal citation omitted).

Further, Article 12 does not "define" or impose a "substantive limitation" on the remedy or relief available. Although after one year the left-behind parent's right to automatic return of the child expires, other remedies or relief remain available. The left-behind parent still may pursue: (i) the child's return under Article 12; (ii) an award of expenses incurred as necessary to locate the child, court costs and legal fees, and travel costs for the petitioner and child, 42 U.S.C. § 11607; and (iii) any other legal channel that may be available for obtaining return, *e.g.*, custody proceedings. *Compare Young*, 535 U.S. at 49 (concluding period was non-substantive on ground that remedy, *i.e.*, non-dischargeability, was not "defined by" period but remained otherwise available "[e]ven if [the] tax debt falls outside ... the lookback period" and other equitable remedies, such as a foreclosure suit, "may still be available"); *Holland*, 130 S. Ct. at 2561 (finding period non-substantive where it did not impose "substantive limitations upon the amount of recovery"); *cf. Brockamp*, 519 U.S. at 352 (1997) (rejecting application of equitable tolling when limitations periods were used to define substantive limits on what a taxpayer could recover).

II. The Court Should Reject the State Department's View That "Equitable Tolling" Is Not Available as to the One-Year Period Under Article 12.

A. History of the State Department's View.

1. The State Department's original position, as expressed through the United States delegation to the May 1980 Hague Conference, was that Article 11—the predecessor to Article 12—was "[a] statute of limitations." Prel. Doc. No. 7, *Actes et Documents*, 242.

In 1986, as part of the enactment of ICARA and ratification of the Convention, the State Department prepared "a detailed Legal Analysis of the Convention to assist the [Senate Committee on Foreign Relations] and the full Senate in their consideration of the Convention." 51 Fed. Reg. 10,494 (1986). The Department addressed the one-year period under Article 12, stating that:

> If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

JA-100. The Legal Analysis preceded enactment of ICARA—a condition precedent to the Convention taking effect in the United States, JA-38—and thus speaks to Congress's understanding of Article 12.

In 2006, the State Department formally endorsed equitable tolling of the one-year period by courts within the United States:

> [The State Department] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition.

Pet. App. 169a. As the State Department conceded below: "During the discussion of this issue in the Special Commission, no delegation disagreed" with the Department's endorsement of equitable tolling. *Id.* at 184–85a. The United States incorporated by reference its lengthier response to Question 13(f), which explained that "[t]he U.S. Supreme Court has stated that, unless Congress states otherwise, equitable tolling should be read into every federal *statute of limitations*." *Id.* at 167a–69a (emphasis added) (citing *Young*, 535 U.S. at 49).

2. In 2012, in an *amicus* brief submitted to the Second Circuit in this case, the State Department asserted, for the first time, that the term equitable tolling is a "poor fit" for Article 12 of the Convention. *Id.* at 172a n.2. At that time, the State Department claimed that its explicit endorsement of and advocacy for "equitable tolling" in 2006 "should be understood in the sense of the availability of the exercise of equitable discretion." *Id.* at 184a–85a n.11.

In May 2013, the State Department conceded that, in the 2006 Questionnaire, in fact it had "endorsed" the concept of equitable tolling, "as it had been applied in several lower-court decisions, as a means

of enabling courts to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions." Cert Br. of Amicus Curiae United States 14–15 n.4. In the State Department's words:

> Upon broader examination of the issues in connection with its participation in this case as an amicus curiae, the Department concluded that "equitable tolling" in the traditional sense is not the appropriate framework for considering concealment and other equities. Rather, "equitable discretion" is the more appropriate framework for consideration by courts of concealment and other factors bearing on return.

Id.

B. The Court Need Not Decide Whether Courts May, in Their Discretion, Forgo the Settled Question Altogether.

The State Department and Petitioner agree that, where a petition for return is filed one year or more after wrongful removal and the court finds the child to be settled, the court nonetheless maintains discretion to order return. Art. 18 (providing that nothing in the Convention "limit[s] the power of a judicial or administrative authority to order the return of the child at any time"); *cf.* Cert Br. of Amicus Curiae United States 7–8; *Id.* at. 9, 11, 12 (asserting that such discretion arises within Article 12 itself).

The State Department further asserts that, where a petition for return is filed one year or more after wrongful removal, under Article 12 a court "may consider" whether the child has become settled in the

jurisdiction, *id.* at 9, but "also affords the court discretion to dispense with the 'settled' inquiry" altogether. *Id.* at 12; *id.* at 7 ("A court may also decline to undertake the settlement analysis ... if the circumstances of the case warrant ....").

The State Department characterizes this as a means by which the Convention "provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct ...." *Id.* at 11. Accepting these premises, the Second Circuit held that "while the text of Article 12 does not prohibit equitable tolling, the way this provision functions renders [equitable tolling] *unnecessary*." Pet. App. 19a (emphasis added).

To be sure, Articles 12 and 18 "complement each other to a certain extent ...." Explanatory Report, at ¶ 106, 458. But the language of Article 12 is unambiguous: It provides that where a proceeding has been commenced more than one year after the abduction, the child must be returned "*unless it is demonstrated* that the child is now settled in its new environment." Art. 12. Nothing about this language suggests that a court can "decline" to consider the settled question. *See* Explanatory Report, at ¶ 107, 458 (stating "after a child has become settled in its new environment, its return should take place *only* after an examination of the merits of the custody rights exercised over it") (emphasis added); *id.* at ¶ 109, 459 (noting "the Convention[] ... maintain[s] indefinitely a real obligation to return the child ... [but] such an obligation disappears whenever it can be shown that" the child is settled).

The text of Article 18 is more ambiguous, stating that nothing in Chapter II of the Convention "limit[s] the power" of a court to order return "at any time."

Art 18. In support of the premise that the Convention "permits" a court to dispense altogether with the settled inquiry, Pet. App. 179a, the Second Circuit and the State Department rely upon cases that stand for the quite distinct proposition that Article 18 grants courts the "discretion to order return even if the child is settled." Cert Br. of Amicus Curiae United States 11 (citing *Blondin* v. *Dubois*, 238 F.3d 153, 164 (2d Cir. 2001)); Pet. App. 19a, 27a. But the "discretion to order return even if the child is settled," Cert Br. of Amicus Curiae United States 11, plainly is not the same as discretion to "dispense [altogether] with the settled inquiry ...." *Id.* at 12. Thus, insofar as the State Department maintains (and the Second Circuit concluded) that this equitable discretion renders equitable tolling "unnecessary," Pet. App. 19a, that theory rests on a false premise. Nothing in the text of Article 18, its drafting history, or the Explanatory Report establishes that courts retain discretion to dispense with the settled analysis. In fact, it appears every foreign court to have considered this issue has reached the opposite conclusion. *See infra*, Argument, Section III, pp. 47–51.

Regardless, as detailed above, *see supra*, Argument, Section I.D., pp. 31–32, the existence of other equitable remedies is not itself sufficient to overcome the presumption in favor of equitable tolling. Thus, the Court need not determine whether the State Department is correct in asserting that courts retain discretion to dispense with the settled analysis.

C. The Court Should Decline To Adopt the View Most Recently Advocated by the State Department That Equitable Tolling Is Unavailable.

For several reasons, the Court should decline to adopt the approach advocated by the State Department that equitable tolling is unavailable.

1. The State Department opposes equitable tolling, in part, on the premise that "the very purpose" of the one-year period is to allow courts "to consider the child's settlement" where the child has been in a new country for one year or more. Cert Br. of Amicus Curiae United States 10. But the United States acknowledges that under the approach it supports—equitable discretion—a court may "dispense with the 'settled' inquiry." *Id.* at 12. Hence, the premise upon which the United States rejects equitable tolling—that it "disrupt[s] [the] framework" of the Convention by allowing courts not to reach the settled analysis, *id.* at 10—logically collapses. Either approach allows a court not to reach the settled analysis.

The State Department contemplates hinging the decision of whether to address the settled question on, "[f]or instance," how "extreme" an abducting parent behaved in concealing the child. *Id.* at 12. The Government's position would have a court weigh the extremeness of the concealment and the risk of harm presented by return. But the degree of disruption or trauma that would be caused by a child's return does not depend on the extremity of the abducting parent's concealment, and there is no reason that the law should weigh or value that trauma more or less depending on the degree of concealment. The degree of concealment does nothing to mitigate or justify tolerating more or less

trauma. Thus, it calls for a court to balance "incommensurate interests." *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (rejecting balancing test that would require "judging whether a particular line is longer than a particular rock is heavy").

2. The State Department also opposes equitable tolling on the theory that it "would entirely preclude district courts, *once they have concluded that equitable tolling is appropriate*, from considering whether the child is settled ...." Pet. App. 175a (emphasis added). This is a tautology. When a court determines it appropriate not to reach the "settled" analysis, it does not reach the settled analysis. That remains true regardless of whether the standard by which the Court made that determination is "equitable discretion" (dependent, for example, on the egregiousness or extremity of the concealing acts) or traditional common law principles of "equitable tolling." Denominating one method as a decision by the court to "decline" and the other as a decision to "preclude itself" is misplaced. In either instance, the court does not reach the issue.

3. As the United States acknowledged in its brief in support of certiorari, one of the most "important animating principles of the Convention" is to "deter[] concealment and ensur[e] that abduction does not confer tactical advantages on the abducting parent ...." Cert Br. of Amicus Curiae United States 11. But equitable discretion allows an abducting parent to conceal the child long enough "to prevent the timely filing of a Hague petition." Pet. App. 169 (responding to Questionnaire). The only limit on the abducting parent's misconduct is that the concealment must not be "extreme." As this case

demonstrates, an abducting parent need not engage in "extreme" concealment in order to thwart the timely filing of a petition and thereby gain the tactical advantage of being able to defeat return on the premise that the child is settled. Equitable discretion thus permits an abducting parent to frustrate return based on the very fruits of his or her own misconduct, so long as his or her concealment is effective but not extreme.

Given that the standard for "extreme" concealment is found to be met in only the rarest of circumstances, equitable discretion incentivizes abducting parents to conceal their children. With the exception of courts that have applied tolling to the one-year period of Article 12, it appears only two United States courts in published decisions have ever ordered the return of a child after making a settled finding. *See F.H.U.* v. *A.C.U.*, 48 A.3d 1130, 1146–47 (N.J. Super. 2012); *Antunez-Fernandes* v. *Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003). The rarity and overwhelming unlikelihood of courts ordering a child's return after having considered and made a settled finding is illustrated by the decision of the district court below. After finding the child settled despite numerous negative factors such as her young age, her mother's unemployment, her illegal immigration status, and past criminal activity and drug addiction among the people with whom she now resides, Pet. App. 60a, 105a–10a, the court declined to exercise its discretion to return the child because she is "more vulnerable than an average five-year-old who has never experienced trauma" and because a move "would be difficult ...." *Id.* at 112a–13a.

4. The proper approach is not unbounded "equitable discretion" alone but instead to bar the

concealing abductor from defeating return based on "settlement" where the left-behind parent can establish that (1) he or she has been pursuing his/her rights diligently, and (2) some extraordinary circumstance stood in his or her way. *See Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) (holding that a litigant seeking equitable tolling generally bears the burden of establishing these two elements). *See, supra*, Argument I.A–C (describing propriety of employing national law and procedures where they may facilitate return under the Convention).

5. The Court need not, and should not, accord typical weight to the latest position of the State Department. *Cf. Abbott*, 130 S. Ct. at 1993 (concluding there was no reason to question whether the State Department's views were entitled to deference where those views were consistent and long-held).

III. The Courts of Sister Signatories Have Addressed Concealment in Various Ways.

In interpreting the Convention, the Court accords "considerable weight" to the opinions of sister signatories. *Abbott*, 130 S. Ct. at 1993. The Court has expressed hesitation to follow the opinions of intermediate appellate courts of sister signatories, especially where there are substantial factual distinctions between the cases, and where the respective courts of last resort have yet to speak. *Olympic Airways* v. *Husain*, 540 U.S. 644, 655 n.9 (2004). Of course, the Court should not substitute the judgment of other courts for its own. *Abbott*, 130 S. Ct. at 2008 (Stevens, J., dissenting).

It appears that no court of last resort in any Contracting State has substantively addressed

whether equitable tolling is available under Article 12.

1. In *In re H* (Abduction: Child of 16), [2000] EWHC (Fam) 2 FLR 51, [2000] 3 FCR 404 (Eng.), *available at* http://www.hcch.net/incadat/fullcase/0476.htm, the father commenced return proceedings within 12 months of confirming the whereabouts of his children, though more than 12 months after wrongful removal. *Id.* The High Court of Justice of England and Wales found it "necessary to consider why the proceedings were so delayed." *Id.* The court held that the reason for delay is "relevant to the question of settlement because ... time in hiding cannot go to establish settlement ...." *Id.* It found:

> The mother in effect was playing ducks and drakes with the father. She did not disclose her address ... [and] was unwilling to have any meaningful contact with the father or to give him any information which might assist him to take any proceedings in relation to the children.

Id. The court held that in such circumstances the mother cannot rely upon the settlement question, explaining:

> [I]t is not good law for the abducting parent to be able to say "well, I have managed to evade the wronged parent; I have managed to hide my address and whereabouts of the children and I am going to rely on that in advance of the argument that the children have been so long in the jurisdiction that they have now settled in that environment and the court should exercise a judgment not to return them to the original jurisdiction."

Id. The court thus adopted equitable tolling.

2. A handful of lower and intermediate courts in other Contracting States have declined to adopt equitable tolling. For example, in *Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.), the Court of Appeal of England and Wales held that even where the "abductor may have caused or contributed to the period of delay that triggers [the "settled" inquiry], it "would not support a tolling rule." *Id.* at ¶ 51. The court noted "American jurisprudence has developed the concept of tolling or equitable tolling ... to disregard all time during which the child has been concealed," and "[i]n the majority of the reported American cases the concept of tolling has been applied." *Id.* at ¶¶ 28–29. Thus, "it is plain that an abductor who has gained time by concealment will not ordinarily prove settlement within the meaning of Article 12 in an American court." *Id.* at ¶ 29. The court observed that, at that time, "there [was] no Federal Appellate Court authoritative decision." *Id.* The court further observed that other Contracting States "construe[] Article 18 to confer upon the court a discretion ... where ... the proceedings were commenced more than twelve months after the abduction and ... the child is settled in a new environment." *Id.* at ¶ 48.

The court declined to "support a tolling rule," on the ground that it "seems ... too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome." *Id.* at ¶ 51. Instead, to deter and remove the benefit an abducting parent might otherwise gain from her wrongful action, the English court fashioned and applied a legal rule it believed more appropriate

under its domestic common law: a heightened burden of proof under the settled inquiry in cases of concealment. *Id.* at ¶ 61 ("In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased.").

In *Kubera* v. *Kubera*, 2010 BCCA 118 (B.C.), the British Columbia Court of Appeal also declined to adopt equitable tolling. Instead, the court adopted a "single inquiry" approach, whereby a court must simultaneously consider its exercise of "residual discretion" and the settlement question in order "to determine if both the objectives of the Convention and the interests of the child in the particular factual circumstances are best achieved by determining that the child is now settled in his or her new environment." *Id.* at ¶ 103.

In 2004, in *A.C.* v. *P.C.*, HCMP001238/2004, 2005 WL 836263, [2005] HKEC 839 (Ct. of First Instance) (H.K.), the Hong Kong High Court of Miscellaneous Proceedings also declined to adopt equitable tolling. The court noted the "dearth of jurisprudence on this issue," *id.* at ¶ 37, but considered authorities in support of tolling, including *Furnes* v. *Reeves*, 362 F.3d 702 (11th Cir. 2004), and *In re H* [2000] 2 FLR 51, which the court found to be "highly persuasive." *Id.* at ¶ 43. The Hong Kong court ultimately concluded that: (i) "[d]eliberate concealment by an abducting parent does not suspend or toll the effluxion of the one year under [Article 12]," although it may be relevant to whether settlement is established, *id.* at ¶ 42; (ii) if a court finds a child settled, then "no discretionary power to order return subsists," *id.*; and (iii) "Article 18 does not create a residual discretion to make a return order under the

Convention." *Id.* Rather, "[i]ts purpose and effect are to make it clear that the Convention in no way limits or precludes ... ordering return pursuant to ... domestic laws." *Id.*

While *Cannon*, *Kubera*, and *A.C.* decline to adopt the doctrine of equitable tolling, each contemplates that, after the passage of one year, a court *must* reach the settled question. As such, these decisions flatly reject the premise upon which the State Department opposes—and the Second Circuit rejected—equitable tolling: that equitable tolling is "unnecessary" because equitable discretion under Articles 12 and 18 permits a court to dispense with that analysis. Cert. Br. of Amicus Curiae United States 12; Pet. App. 19a. Thus, these foreign court decisions are no more supportive of the State Department's "equitable discretion" approach than of the "equitable tolling" approach advocated by Petitioner and adopted overwhelmingly by courts in the United States. They merely reflect that, consistent with the Conference's recognition of "profound differences" among the legal systems implementing the Convention and consistent with Article 34, courts have developed and applied law and rules from within their systems in order to address most effectively the concealment problem as it exists in their nation.

3. In *Secretary for Justice* v. *H.J.*, [2006] NZSC 97 (N.Z.), the Supreme Court of New Zealand did not consider whether tolling is available.[18] Nor did the

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[18] The lower court considered *Furnes* v. *Reeves*, 362 F.3d 702 (11th Cir. 2004), and *In re H*, [2000] 2 FLR 51, but declined to adopt equitable tolling. *Secretary for Justice v. H.J.*, [2006] NZSC 97, ¶ 20 n.15.

court contemplate whether a lower court could dispense with the settled analysis, and if so, under what standard. It held that in a case of concealment, the court retains discretion to return a settled child. The court stated that in exercising such discretion "an inquiry into the extent of concealment or the reasons why a party has not made application earlier will generally be irrelevant," *id.* at ¶ 22, but should depend upon "the welfare and best interests of the children." *Id.* at ¶ 24.

In the aggregate, these decisions illustrate that: (i) concealment presents a pernicious problem that must be accounted for, and (ii) to address the issue of concealment, States have applied legal rules and methods from among their own existing domestic law.[19]

4. In response to this problem of concealment in the United States, an overwhelming majority of federal appellate and district courts have found equitable tolling is necessary and proper where, as in this case, the abducting parent concealed the child's

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[19] In its amicus brief supporting certiorari, the State Department cites *P.* v. *B.* (No. 2), [1999] 4 I.R. 185 (Ir.); *In re M.*, [2007] UKHL 55, [2008] 1 A.C. 1288 (Eng.); *cf. Director-General, Dept. of Cmty. Servs.* v. *M. & C.*, [1998] 24 Fam. L.R. 178 (Austl.). Those cases, however, are inapposite. In none of the cases did the court find the child to be concealed (indeed, in two of the cases there was no claim of concealment). As such, none of those courts considered the standard by which a court is to determine whether to dispense with the settled inquiry. Similarly, although *A.* v. *M.*, 2002 NSCA 127 (N.S.), dealt with concealment, the court did not consider whether to dispense with the settled analysis or speak to the standard by which that decision is made.

whereabouts from the left-behind parent. *See, e.g.*, Cert Petition 19–21; 2d Cir. Br. of Petitioner 14–15 (collecting cases). These United States courts have recognized, as did the United States' Convention delegation, that petitioners here face a large federated country, which also has no requirement for persons to register upon establishing or changing their residence. Prel. Doc. No. 7, *Actes et Documents*, 242. *See* Silberman, 38 U.C. DAVIS L. REV. at 1079 & n.129 (contrasting concentration of jurisdiction in Germany and in England and Wales on the one hand with the federated system of the United States on the other). Further complicating the process, as a prerequisite to commencing an action here for return of child, a petitioner must determine, consistent with the requirements of Fed. R. Civ. P. 11, the court that "is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b). *See supra* p. 33 n.13.

IV. The Objects and Purposes of the Convention Are Furthered if Equitable Tolling, as Set Forth in *Pace*, Is Available.

1. The primary purpose of the Hague Convention is to protect children from international abduction by (i) returning an abducted child, typically to the nation of habitual residence, for adjudication of custody rights under that nation's laws and (ii) deterring child abductions. *Abbott*, 130 S. Ct. at 1996–97. For all of the reasons set forth above, in the United States, equitable tolling of the one-year period in cases of concealment accords with the Convention's purpose.

2. As the United States noted in its brief recommending certiorari, if the Court finds equitable tolling is available, it may "articulate standards for

tolling in Convention cases." Cert Br. of Amicus Curiae United States 18. The district court held that, if equitable tolling were available, it would apply only where the abducting parent has "engaged in egregious conduct." Pet. App. 104a. The Second Circuit did not articulate a standard for determining, whether, in the event equitable tolling were available, it applies in a particular case. *Id.* at 16a–17a.

Abduction of a child is always "egregious." If the Court finds equitable tolling is available as to Article 12 in cases of concealment, it should direct that *Pace*, 544 U.S. at 418, govern the question of whether equitable tolling applies in a particular case. Specifically, courts shall toll the one-year period when a litigant seeking relief establishes that (1) he or she has been pursuing his/her rights diligently, and (2) some extraordinary circumstance stood in his or her way. *Id.*

V. Even if the Court Concludes That the Article 12 Period Is Not a Statute of Limitations, Equitable Tolling Principles Should Be a Necessary Part of a Court's Exercise of "Equitable Discretion."

As the State Department further observed in its brief recommending certiorari, "if the Court holds that equitable tolling as such should not be applied to the one-year period, it could offer guidance concerning how delay in commencing a proceeding might nonetheless be taken into account in deciding whether to order return of a child ...." Cert Br. of Amicus Curiae United States 18.

With respect to equitable discretion, the district court held that Lozano's diligence and Alvarez's

concealment did "not outweigh the child's interest in remaining in her current, stable environment." *Id.* at 112a. The Second Circuit affirmed the district court's holding without further elaborating on the proper standard by which to apply equitable discretion. *Id.* at 16a–17a.

If the Court finds that the determination of whether to address the "settled" question is governed only by "equitable discretion," it nonetheless should direct that the elements set forth in *Pace* be a necessary part of the exercise of that equitable discretion. A structure that relies solely on vague notions of discretion to determine whether to forgo the "settled" question fails to further—and, in fact, undermines—the Convention's objective of deterring abduction.

In short, equitable tolling tells abducting parents: "If you abduct your child to the United States and conceal your whereabouts, you will not benefit from the misconduct." The Second Circuit and State Department approach of equitable discretion sends the message: "You probably will."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the case should be remanded with instructions that traditional common law principles of equitable tolling, *see supra* Argument sections IV–V, are available under Article 12 of the Convention.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 12-820

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or "Convention") allows a court to deny repatriation of a child if a parent files a petition for return more than one year after the child's removal and the child is found to be "now settled" in her new environment. The question presented is:

Whether principles of equitable tolling should be applied to the one-year period that triggers the availability of the "now settled" exception to return under Article 12, where application of equitable tolling would be contrary to the text, purpose, history and signatories' post-ratification understanding of the Convention.

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STATEMENT OF THE CASE

In July 2009, Respondent Diana Lucia Montoya Alvarez and her now eight-year-old daughter fled the United Kingdom to escape an abusive relationship with Petitioner Manuel Jose Lozano, the child's father. Ms. Montoya Alvarez and her daughter sought refuge in New York with Ms. Montoya Alvarez's sister, Maria Castro. Upon their arrival, Ms. Montoya Alvarez immediately sought therapy for herself and her daughter, who exhibited signs of trauma and ultimately was diagnosed with post-traumatic stress disorder. Since resettling in New York, as a result of the stable environment Ms. Montoya Alvarez has provided, the child's condition has improved dramatically and she is thriving.

More than 16 months after the child left the United Kingdom, Petitioner filed a petition in the United States District Court for the Southern District of New York pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or "Convention")[1] to return the child to the United Kingdom for a custody determination. After a two-day evidentiary hearing, the district court denied the petition. The district court held that Ms. Montoya Alvarez had satisfied an exception to return provided for in Article 12 of the Convention, which

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[1] The full text of the Hague Convention is reproduced at Pet. App. 129a-49a. Relevant provisions are reproduced in the Addendum to this brief.

permits courts to deny repatriation if a parent files a petition for return more than one year after the child's removal and a preponderance of the evidence shows that the child is "now settled in [her] new environment" such that return would not be in her best interests. *See* Convention, art. 12. The district court rejected Petitioner's argument that the court should equitably toll the one-year period that triggers the availability of the "now settled" exception, holding that equitable tolling does not apply. In the alternative, the court held that even if equitable tolling were generally available, it would not apply on the facts of this case because the Petitioner was not sufficiently diligent and Ms. Montoya Alvarez did not conceal the child to an extent that justified the application of equitable tolling. Finally, the district court declined to exercise its equitable discretion to return the child. On appeal, the Court of Appeals for the Second Circuit unanimously affirmed the district court's decision on all grounds.

Petitioner argues that Ms. Montoya Alvarez should not be permitted to raise the now settled exception because it was her alleged concealment of the child that prevented him from filing within the one-year period. Accordingly, he claims that the one-year period that triggers the availability of the now settled exception should be subject to equitable tolling and did not begin to run until he had located the child. However, as the Second Circuit correctly held, Petitioner's desire to put his interests above those of his child is not permitted by the Convention. Although the Convention provides a remedy to return a wrongfully removed child to her home

country for a custody determination, the Convention's drafters created a number of exceptions which recognize that, in certain situations, it is in the child's best interests to remain in her current country. The now settled provision provided in Article 12 is one such exception.

In arguing that courts should toll the one-year period that triggers a respondent's ability to assert the now settled exception, Petitioner attempts to impose a statute of limitations concept where such concept has no application. As the Second Circuit correctly found, the one-year period in Article 12 neither functions like a statute of limitations nor furthers the same purpose—namely, providing certainty to a defendant regarding his potential liability after a set period of time. Rather than barring a parent from filing a petition for return, the now settled exception, including the one-year period that triggers it, simply permits courts to take into account the interests of the child without regard to the interests of either parent. On its face, the one-year period is not a statute of limitations; therefore, it cannot be equitably tolled.

Not only is the importation of equitable tolling contrary to the plain text of the Convention, but it is contrary to every other source the Court traditionally consults as an interpretative aid: equitable tolling is contrary to the purpose of the Convention, as it would prohibit a court from examining the interests of the child after a year even though that was precisely what the exception was designed to permit; equitable tolling is directly at odds with the drafting history, wherein the Convention delegates heavily debated what period to apply and considered—but

rejected—including a longer period in cases of concealment; the United States Executive Branch has rejected the application of equitable tolling; and sister signatory states that have examined the issue have declined to adopt equitable tolling.

Thus, this Court should affirm the decision of the Second Circuit that the one-year period set forth in Article 12 is not subject to equitable tolling and allow the child to remain in the United States where she is now settled.

A. Background of the Convention.

The United States is a signatory to the Hague Convention, which came into force in the United States on July 1, 1988. Congress implemented the Convention through the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* ("ICARA"). The Convention provides that a child removed from her country of habitual residence in violation of a parent's custody rights should promptly be returned, unless certain exceptions apply. *See* Convention, art. 1; *see also Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1987 (2010).

At its core, the Convention aims to protect the best interests of children, and was motivated by the conviction that "the interests of children are of paramount importance in matters relating to their custody." Convention, preamble. According to the explanatory report prepared by the official Hague Convention reporter, Elisa Pérez-Vera ("Pérez-Vera Report"), the Convention's primary remedy of return was premised on the assumption that, in the majority of cases, return would be in the child's best

interests. Elisa Pérez-Vera, *Explanatory Report*, in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, Actes et Documents de la Quatorzième Session: Child Abduction 426, ¶ 23 (Permanent Bureau Trans., 1982) ("3 Actes et Documents").[2] The Convention recognizes, however, that in certain circumstances return is contrary to a child's best interests, and it includes a number of exceptions to the return remedy. *See Abbott*, 130 S. Ct. at 2010 (Stevens, J., dissenting) ("Recognizing that not all removals in violation of the laws of the country of habitual residence are contrary to a child's best interests, the Convention provides a powerful but limited return remedy.").

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[2] Pérez-Vera was "the official Hague Conference reporter for the Convention," and her explanatory report is recognized to be "the official history and commentary on the Convention." Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986). Although Petitioner highlights that this Court has not yet decided whether the Pérez-Vera Report "should be given greater weight than a scholarly commentary," Pet. Br. 9 n.5 (quoting *Abbott*, 130 S. Ct. at 1995), the Petitioner relied repeatedly on the Pérez-Vera Report in his opening brief before this Court and in his briefing below. *See, e.g.*, Pet. Br. 9-10, 23, 30; Pet. C.A. Br. (Sept. 30, 2011), at 27, 30-32, 45. Moreover, courts across the United States consistently rely on the Pérez-Vera Report, *see, e.g.*, *Yaman v. Yaman*, --- F.3d ----, Nos. 13-1240, 13-1285, 2013 WL 4827587, at *10 (1st Cir. Sept. 11, 2013); *Robert v. Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007) (collecting cases), as do signatory countries, *see, e.g.*, *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288, 1298-99 (appeal taken from Eng.); *Kubera v. Kubera*, [2010] BCCA 118, para. 96 (B.C.); *A.C. v. P.C.*, [2005] HKEC 839, para. 47 (H.K.).

The exception at issue in this case is located in the second paragraph of Article 12 of the Convention, and states that where a proceeding for return is commenced[3] more than one year after a child is removed, a court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Convention, art. 12. This exception to return commonly is referred to as the "now settled" or "well settled" exception.[4] The one-year period in Article 12 reflects the judgment that after the child has spent one year in a new environment, the child might become adjusted to that environment such that return would not be in her best interests. After one year, courts are permitted to consider evidence of the child's ties to her present environment and overall well-being to determine whether the child's best interests are served by allowing the child to remain in her present

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[3] Congress established that a proceeding is commenced in the United States when a petition for return is filed in a court that has jurisdiction in the place where the child is located at the time the petition is filed. ICARA, 42 U.S.C. § 11603(b), (f)(3).

[4] The other exceptions to return are not dependent on the amount of time that has passed between the removal and the commencement of proceedings. The removing parent can defend against the petition for return at any time by establishing that (i) the petitioning parent was not exercising custody rights at the time of removal or consented to removal, Convention, art. 13(a); (ii) there is "grave risk" that return will subject the child to harm, *id.*, art. 13(b); (iii) the child is mature and objects to return, *id.*, art. 13; or (iv) return would not be permitted by the fundamental principles relating to the protection of human rights and fundamental freedoms, *id.*, art. 20. *See also Chafin v. Chafin*, 133 S. Ct. 1017, 1021 (2013) (listing exceptions to return).

environment rather than returning the child to her former country of residence.

The passage of a year does not bar a left-behind parent from pursuing the return remedy. *First*, Article 12 does not prohibit the filing of petitions after one year. *Second*, although the passage of a year triggers the removing parent's ability to raise the now settled exception, it does not create a presumption that the child is settled and need not be returned. Rather, to avoid repatriation, the removing parent still must "demonstrate" that the child is integrated into her new environment. Convention, art. 12. Congress established that settlement must be proven by a preponderance of the evidence. ICARA, 42 U.S.C. § 11603(e)(2)(B). *Third*, nothing in the text of Article 12 or the Convention prohibits a court from exercising its equitable discretion to return a child even after determining that she is settled. This is reinforced by Article 18, which states that nothing in the Convention "limit[s] the power of a judicial or administrative authority to order the return of the child at any time." Convention, art. 18.

B. Factual Background.

Ms. Montoya Alvarez and Petitioner met and began dating in London in early 2004. Pet. App. 4a-5a. Their relationship deteriorated after Petitioner began to abuse Ms. Montoya Alvarez verbally, regularly calling her stupid and useless, and often telling her to kill herself. Pet. App. 45a-46a, 50a. Ms. Montoya Alvarez testified that Petitioner also physically abused her and raped her on four occasions. Pet. App. 45a.

In October 2005, Ms. Montoya Alvarez gave birth to the couple's child, who lived with Ms. Montoya Alvarez and Petitioner in London. Pet. App. 5a. In October 2008, Ms. Montoya Alvarez became concerned with the child's behavior and spoke with the child's doctor about a variety of issues, including the child's unwillingness to speak at her nursery school, frequent crying, nightmares and bed-wetting. *Id.* The nursery school manager also noticed the child's behavior and concluded that the home "environment obviously had a negative effect upon [the child] and [she] became an elective mute at the nursery . . . and became very withdrawn." Pet. App. 52a. Accordingly, the district court found that "the child had been exposed to, and negatively affected by, the problems in the couple's relationship." Pet. App. 5a-6a.

In November 2008, Ms. Montoya Alvarez went to New York for a week to visit her sister, Maria Castro. Pet. App. 55a. Petitioner testified that before Ms. Montoya Alvarez left, she gave Petitioner her sister's address and telephone number in case he needed to reach her. Pet. App. 59a-60a n.10.[5]

Ms. Montoya Alvarez testified that when she returned, Petitioner was acting very suspiciously and

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[5] Although Petitioner now claims that he did not have Ms. Castro's address when he filed his Application with the Central Authority for England and Wales in March 2010, and relies on the parties' Agreed Confidentiality Order as evidence that he does not have her address currently, Pet. Br. 16 n.7, he testified at trial—and the district court specifically found—that he had her address the week before Ms. Montoya Alvarez left Petitioner. Pet. App. 102a.

the child was acting fearful. Pet. App. 55a. Ms. Montoya Alvarez demanded that Petitioner leave the house immediately. *Id.* When he did not, Ms. Montoya Alvarez decided to leave. *Id.*

On November 19, 2008, Ms. Montoya Alvarez left her home with the child and went to the police station to report Petitioner's abuse. Pet. App. 55a-56a. The police ultimately referred her to a women's shelter for victims of domestic violence, where she and the child resided for several months. Pet. App. 56a-57a. On July 3, 2009, Ms. Montoya Alvarez and the child left the shelter and went to France and, on July 8, 2009, traveled to New York to live with Ms. Castro—the same sister Ms. Montoya Alvarez had visited one week before she moved out of her home. Pet. App. 58a, 103a. Ms. Montoya Alvarez "enrolled the child in school, [and] did not change either her or the child's names." Pet. App. 103a. She did not "move the child from one location to another or take other steps to remain hidden." *Id.* She remained in her sister's home.

When the parties separated in November 2008, Petitioner suspected that Ms. Montoya Alvarez would go back to New York to live with her sister. As the district court found, Petitioner stated explicitly in papers he filed in the United Kingdom in July 2009 that "'when the Parties separated in November 2008, the Respondent threatened to take the child to the USA permanently' because she had siblings in the United States who would be able to support her." Pet. App. 59a n.10 (quoting JA-226). At the evidentiary hearing, Petitioner again admitted that when Ms. Montoya Alvarez and the child left in November 2008, he knew that

"Ms. Montoya Alvarez had the ability and the intention to go to the United States to live with her sister," and he believed that "in [the] long term, she will take my daughter to United States." C.A. App. A310.

Not only did Petitioner anticipate from the moment Ms. Montoya Alvarez left that she would go to live with Ms. Castro in New York, but he also had Ms. Castro's contact information. As the district court found, Petitioner stated in his Application to the Central Authority that he had not one, but two contact numbers for Ms. Castro in New York—her home number and her mobile telephone number. Pet. App. 59a-60a n.10. The district court further found that Petitioner's statement in his Application that he did not have an address for Ms. Castro was contradicted directly by his admission at the evidentiary hearing that "when Respondent visited Maria in November 2008, Respondent left Maria's name, address, and phone number in writing with Petitioner." *Id.*

The district court found that, despite Petitioner's belief from day one that Ms. Montoya Alvarez intended and had the ability to go to New York to live with her sister, Petitioner never called Ms. Castro to determine whether Ms. Montoya Alvarez had taken the child there. Pet. App. 102a. Furthermore, Petitioner never asked his solicitors to contact Ms. Castro to see if Ms. Montoya Alvarez had done so. *Id.* Finally, Ms. Montoya Alvarez did not conceal her or her child's whereabouts or their identities such that these efforts would have been futile; they were living under their own names exactly where she told Petitioner she would go and

where Petitioner suspected she would go. Pet. App. 103a.

In New York, Ms. Montoya Alvarez and the child live with Ms. Castro, along with Ms. Castro's partner, daughter and granddaughter. Pet. App. 6a. Ms. Montoya Alvarez and her daughter are supported by Ms. Castro, who has been employed as a nanny for the same family for many years, and Ms. Castro's partner, who owns a grocery. *Id.* [6]

After arriving in New York, Ms. Montoya Alvarez and her daughter began receiving therapy. Pet. App. 7a. Their therapist testified that "when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office, which the therapist characterized as 'very unusual for a normally developed three-year-old child'; in addition, the child would wet herself, was hypervigilant, and had a very heightened startle response." Pet. App. 62a (quoting C.A. App. A453). By February 2010, the therapist had diagnosed the child with post-traumatic stress disorder. Pet. App. 63a.

Since her arrival in New York, the child has attended the same school. Pet. App. 6a. According

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[6] Petitioner refers to "past criminal activity and drug addiction among the people with whom [the child] now resides" and incorrectly asserts that the district court considered this fact when deciding whether the child was settled. Pet. Br. 45. To the contrary, the district court expressly found that "there is insufficient evidence to determine that anyone residing in the home currently has any involvement with drugs," and disregarded those allegations. Pet. App. 60a.

to her report cards from 2009 and 2010, she has been progressing both academically and socially. *Id.* Outside of school, the child spends time with her extended family, meets friends at the library and the park, takes ballet classes and attends church with her mother. Pet. App. 6a-7a. The therapist testified that the child is "'a completely different child now,' who has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy." Pet. App. 63a (quoting C.A. App. A455-56); *see also* Pet. App. 7a. Despite her recovery, the district court found that the child is "more fragile than other children" such that removing her from her stable environment could be traumatic. Pet. App. 113a.

C. Proceedings Below.

On November 10, 2010, more than 16 months after Ms. Montoya Alvarez and her daughter left the United Kingdom to escape Petitioner's domestic abuse, Petitioner filed a Petition for Return pursuant to the Convention and ICARA, in the United States District Court for the Southern District of New York, requesting an order requiring that the child be returned to the United Kingdom. Pet. App. 8a-9a.

The district court denied Petitioner's request for the child's return. Although the district court acknowledged that Petitioner had made out a *prima facie* case under the Convention, the court held that Ms. Montoya Alvarez had established by a preponderance of the evidence that the child was now settled in New York and, thus, satisfied the Convention's Article 12 exception to return. The

district court rejected Petitioner's argument that the one-year period between the date of the child's removal and the filing of the petition should be tolled because Petitioner did not know the child's whereabouts during that time. The court concluded that the "one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling." Pet. App. 99a. The court reasoned that "[a] petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located." *Id.* Relying on the Convention's text, history and purpose, the district court ruled that the "settled defense is not [intended] to give petitioners a reasonable amount of time in which to bring their claims," but "to take into account that if the child has become settled, its interests have to be weighed." *Id.*

In the alternative, the district court held that "even if equitable tolling could apply to Convention petitions," it was not "warranted in this case." Pet. App. 101a. Despite Petitioner's efforts to locate his child in the United Kingdom, the district court found that Petitioner unreasonably never attempted to contact Ms. Montoya Alvarez's sister in New York, even though he had her contact information. Pet. App. 102a. The district court further found that Ms. Montoya Alvarez "did not conceal the child to an extent that would warrant equitable tolling." Pet. App. 103a. The court found that Ms. Montoya Alvarez did not go to a location unknown to Petitioner and did not move the child from place to

place to conceal her whereabouts. *Id.* The district court also considered whether to exercise its discretion to order the child's return to the United Kingdom despite finding that she is settled. Pet. App. 112a-14a. The court declined to do so, concluding that uprooting the fragile child could be "traumatic enough that, in the exercise of discretion, it outweighs Petitioner's arguments regarding the equities." Pet. App. 113a.

On appeal, the Second Circuit unanimously affirmed. Based on the text, history and purpose of the Convention, the court of appeals rejected Petitioner's argument that equitable tolling applies to the one-year period in the now settled exception. The court held that the one-year period was not a statute of limitations but "merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency." Pet. App. 19a. The court also recognized that equitable tolling would be inconsistent with the purpose of the now settled exception, which "was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed." Pet. App. 23a-24a. Furthermore, the court noted that tolling would be contrary to the drafting history, wherein the drafters expressly considered including two time-periods in Article 12, depending on whether the child had been concealed—six months if the child's location were known and one year if the child's location were unknown—and rejected that proposal in favor of the single longer period. *Id.* (noting that

the drafting history "strongly supports" Ms. Montoya Alvarez's position). Thus, the court declined to follow contrary decisions from the Fifth, Ninth and Eleventh Circuits, which had neglected to consult the Convention's drafting history when holding that equitable tolling was available. Pet. App. 26a-27a (citing *Dietz v. Dietz*, 349 F. App'x 930, 932-33 (5th Cir. 2009) (summary order), *Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2008) and *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004)). The Second Circuit's conclusions were supported by an amicus brief filed by the United States, which the court had solicited.

Petitioner timely filed a petition for a writ of *certiorari*. On May 24, 2013, pursuant to this Court's invitation, the Solicitor General filed a brief expressing the view of the United States that the decision below was correct, and equitable tolling should not be applied to the one-year period in Article 12. On June 24, 2013, this Court granted *certiorari* as to the first question presented.

After this Court granted *certiorari*, the First Circuit agreed with the Second Circuit that the one-year period in Article 12 is not subject to equitable tolling. *See Yaman v. Yaman*, 2013 WL 4827587, at *2, *9-12.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that the one-year period in Article 12 is not subject to equitable tolling. When interpreting treaties, in particular the Hague Convention, this Court has consulted multiple sources: (1) the text of the treaty;

(2) the purpose of the treaty; (3) the treaty's drafting history; (4) the interpretation of the Executive Branch; and (5) the subsequent understanding of the signatories. *See, e.g.*, *Abbott*, 130 S. Ct. at 1990, 1995. Each of these sources supports the conclusion reached by the Second Circuit. The crux of Petitioner's argument is that equitable tolling should be imported into the Convention as commonly is done in the context of statutes of limitations. The one-year period in Article 12, however, is not a statute of limitations, and the equitable tolling principles developed in that context simply have no application here.

First, the text of Article 12 is clear that the one-year period is not a statute of limitations, and nothing in the text provides for any tolling of that period. Article 12's one-year period does not operate in any way to bar a parent from filing a petition for return. Rather, the period operates only to make available an exception to return, the now settled exception, and permits the court to examine the interests of the child. Article 12 makes no reference to tolling the one-year period provided for therein. Nor does the language of Article 12 allow for any extension of the one-year period. Therefore, according to the plain language of the Convention, the one-year period in Article 12 is not subject to equitable tolling. *See infra* Section I.

Second, because the text is clear that the one-year period in Article 12 should not be subject to equitable tolling, no further inquiry is necessary. However, this interpretation is also consistent with the purpose of the Convention. The one-year period furthers the Convention's goal of protecting the best

interests of children by recognizing that, after a year, a child might be so settled in her new environment that return would be contrary to her best interests. Allowing equitable tolling could prevent a court from considering a child's well-being and ties to her current environment based solely on the actions of her parents, which is directly counter to the purpose of Article 12 and the Convention as a whole. *See infra* Section II.

Third, the Convention's drafting history reflects that the delegates considered having two periods in Article 12—six months if the child's location were known and one year if the child were concealed—and specifically rejected that approach in favor of a one-year period for all situations. The delegates therefore considered the possibility of concealment and nevertheless decided, after much debate, that a single, one-year period best balanced the various goals of the Convention. Applying equitable tolling would upset the drafters' careful compromise. *See infra* Section III.

Fourth, the United States agrees with the Second Circuit that equitable tolling should not apply to the one-year period in Article 12. In two amicus briefs filed in this case solicited by the Second Circuit and this Court, the United States has taken the position that the one-year period is not a statute of limitations and cannot be tolled. *See infra* Section IV.

Fifth, refusing to apply equitable tolling is consistent with the views of sister signatory states. Petitioner points to no country that has adopted equitable tolling. Rather, the courts of four countries

expressly have rejected it. Furthermore, a Special Commission—a meeting among Convention signatories to discuss the implementation and operation of the Convention—addressed the issue, and there was consensus among the representatives that the one-year period should not be lengthened, as it struck the proper balance between the interests of the left-behind parent and the best interests of the child. *See infra* Section V.

Moreover, the Second Circuit also correctly decided that the district court properly declined to exercise its equitable discretion to return the child even though she was settled. Contrary to Petitioner's suggestion that the district court failed to give sufficient weight to Petitioner's allegations of concealment and Petitioner's diligence, in declining to exercise its equitable discretion, the district court carefully and correctly balanced all the relevant factors in determining that the child should not be forced to return to the United Kingdom. *See infra* Section VI.

Even if equitable tolling could be imported into the Convention and applied to the one-year period in Article 12, the district court already held that tolling would not be warranted under the facts of this case. The court determined that Petitioner was not diligent enough to excuse his filing after the one-year period and that Ms. Montoya Alvarez did not conceal the child in any way that would justify equitable tolling. Thus, both on the law and the facts, the decisions of the district court and the Second Circuit that equitable tolling does not apply and that the child is now settled in the United States should be affirmed. *See infra* Section VII.

ARGUMENT

I. THE TEXT OF THE CONVENTION DOES NOT PERMIT EQUITABLE TOLLING OF THE ONE-YEAR PERIOD IN ARTICLE 12.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott*, 130 S. Ct. at 1990 (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). Where the text of a treaty is clear, there is no need to refer to additional sources of analysis. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("[W]here the text is clear . . . we have no power to insert an amendment.").

Nothing in the text of the Convention permits an extension of the one-year period in Article 12 to accommodate the failure of the left-behind parent to locate the child whether due to concealment or otherwise. ICARA similarly is silent. The Convention clearly states that the one-year period begins to run "from the date of the wrongful removal or retention" of the child. Convention, art. 12. If the drafters had wanted the period to run from the date the child was discovered by the left-behind parent, they could have said so. *See Air France v. Saks*, 470 U.S. 392, 399 (1985) ("[I]t is [this Court's] responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."). In fact, as discussed below (*see infra* Section III), the drafters considered and rejected language that would have done just that.

Not finding any language in the text of the Convention to support extending the one-year period,

Petitioner argues that his failure to file within the one-year period should be excused because the doctrine of equitable tolling, developed in the context of statutes of limitations, should be read into the text. Pet. Br. 20, 22-37. Petitioner argues that the one-year period is a statute of limitations and, as such, subject to equitable tolling, which Petitioner argues is "presumptively available with respect to every federal statute of limitations." Pet. Br. 20. Petitioner is wrong.

Statutes of limitations establish a period of time in which an action must be brought; otherwise a plaintiff is barred from enforcing his claim. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) (stating that a statute of limitations "operates, with the lapse of time, to . . . bar the remedy for [a right's] enforcement" (internal quotation marks omitted)); *see also* H. Wood, 1 Limitation of Actions § 1, 2-3 (4th ed. 1916) ("[S]tatutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are . . . statutes of limitation."). The primary purpose of a statute of limitations is to "protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Thus, the length of the period reflects a judgment about when concerns for repose, elimination of stale claims and certainty outweigh a plaintiff's right to pursue a claim. *See Young v. United States*, 535 U.S. 43, 47 (2002) (stating that the "basic policies [furthered by] all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" (internal quotation marks omitted)).

The one-year period in Article 12 is not a statute of limitations. Unlike a statute of limitations, the one-year period in Article 12 does not bar a left-behind parent from filing a petition for return or prevent the child from being repatriated. In fact, the Convention prescribes no time period within which a left-behind parent must file a petition. *See* Pérez-Vera Report ¶ 144 (noting that "no time-limit is imposed on the submission of applications"). The text of Article 12 confirms this approach, explicitly reminding the judicial or administrative authority that even when proceedings have commenced after one year, it "shall also order the return of the child." Convention, art. 12. The exception language ("unless it is demonstrated that the child is now settled in its new environment") comes second in the sentence's structure. Convention, art. 12.[7] The Pérez-Vera Report recognized this ongoing return obligation, noting that Article 12 "maintain[s] indefinitely a real obligation to return the child," even after one year

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[7] The fact that Article 12's one-year period is not a statute of limitations further is illustrated by comparing it to typical statutes of limitations, which "provide that a cause of action may or must be brought within a certain period of time." *Beach*, 523 U.S. at 416; *see, e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 263 (1993) (concluding that 49 U.S.C. § 11706(c)(2), which provides that a shipper "'must begin a civil action to recover damages under [§ 11705(b)(3)] within two years after the claim accrues,'" was a statute of limitations); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 n.10 (1982) ("'A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .'" (quoting 42 U.S.C. § 2000e-5(e) (1970))).

has passed, unless the child is shown to be settled. Pérez-Vera Report ¶ 109.[8]

Thus, because Article 12's one-year period is not a statute of limitations, it is not subject to the doctrine of equitable tolling that has developed in the context of statutes of limitations. Equitable tolling has been applied to statutes of limitations where the balance between a defendant's right to repose and a plaintiff's right to pursue his claim becomes inequitable—for example, where an extraordinary circumstance prevented a plaintiff, despite his due diligence, from filing his claim within the limitations period. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428-29 (1965). Where equitable tolling is applied, plaintiff's claim is treated as having been timely filed. *See Lawrence v. Florida*, 549 U.S. 327, 331 (2007). Those same policy considerations are not present with Article 12's one-year period. Because there is no cutoff for when a petition can be filed, the passage of the one-year period does not bar a petitioner's right to pursue return, nor does it provide a respondent with repose. In fact, the one-year period is not about the interests of the parties at all. Rather, the one-year period triggers the court's ability to consider the interests of the child in adjudicating her return. Accordingly, the

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[8] Even *amicus curiae*, Mexican Association for Abducted and Missing Children, which criticizes the Second Circuit's opinion, recognizes that the one-year period is not a statute of limitations. Amicus Br. of Mex. Ass'n for Abducted & Missing Children 9.

policy motivations behind equitable tolling simply do not apply to Article 12's one-year period.

Petitioner attempts to analogize the one-year period in Article 12 to a statute of limitations by arguing that it eliminates his "right to automatic return." Pet. Br. 29. As Petitioner concedes in his very next words, however, even if a petition were filed within the one-year period wherein a child must be returned "forthwith," Convention, art. 12, the return remedy always is subject to the "existence of certain limited defenses" that, if satisfied, permit a child to remain in her new country. Pet. Br. 29. Thus, there is no right to automatic return. If the left-behind parent does not file his petition within a year, Article 12 simply provides an additional exception to return where it is demonstrated that the child is now settled in her new environment. The Convention's use of the word "forthwith" to describe return when the petition is filed within one year of removal, Convention, art. 12, merely describes the timing of the return, not the substance of the remedy afforded to a petitioner. Due to the passage of a year and the "possibility of longer proceedings" necessary to examine the child's ties to her new environment, the Convention simply recognizes that return "forthwith" would be impossible. *See* Pérez-Vera Report ¶ 109. Contrary to Petitioner's assertion, a left-behind parent retains access to the remedy of return both before and after the one-year period has elapsed.

Petitioner's reliance on *Young v. United States*, 535 U.S. at 43, is misplaced. Pet. Br. 28-29. *Young* analyzed whether equitable tolling applied to the "three-year lookback" period in the bankruptcy code,

which provides an IRS claim for taxes with nondischargeability and priority as long as the IRS makes its claim three years prior to a defendant's filing for bankruptcy. *Young*, 535 U.S. at 46. The lookback period in *Young* was deemed a statute of limitations subject to equitable tolling because after that period, the IRS lost entirely the remedies of priority and nondischargeability in bankruptcy. *See id.* at 47 ("The lookback period is a limitations period because it prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced."). Although this Court noted that the period was a more limited statute of limitations because the IRS still had access to equitable remedies after the lookback period expired, *id.* at 47-48 & n.1, the IRS would have, absent tolling, lost access to the specific statutory remedies it sought—priority and nondischargability. *See id.* at 47 ("[I]f the IRS sleeps on its rights, its claim loses priority and the debt becomes dischargeable."). Unlike the IRS in *Young*, a petitioner retains the Convention's return remedy in Article 12 even after the one-year period has run unless the respondent demonstrates that the child is settled. *See* Pérez-Vera Report ¶ 109; *see also* Pet. Br. 37 (admitting that after one year, a left-behind parent "still may pursue . . . the child's return under Article 12"). Contrary to Petitioner's assertion that after one year, he loses his right to have his child returned automatically, Pet. Br. 29, Petitioner never had an absolute right to automatic return; both before and

after a year, return is subject to the exceptions set forth in the Convention.[9]

Even if the one-year period were a statute of limitations—which it is not—it still would not be subject to equitable tolling. Although this Court has held that statutes of limitations are subject to a "rebuttable presumption of equitable tolling," *Irwin*, 498 U.S. at 95-96, this presumption can be rebutted where tolling would be contrary to the text or intent of the drafters. *See, e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 829 (2013) (Sotomayor, J., concurring) (rejecting equitable tolling where its application "would distort congressional intent"); *Burnett*, 380 U.S. at 426 ("The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent whether the right shall be enforceable . . . after the prescribed time." (internal quotation marks omitted)). As discussed in Section III, *infra*, applying tolling here would be contrary to the intent of the drafters.

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[9] Petitioner's reliance on the fact that a United States representative to the Convention referred to the one-year period in the Preliminary Draft of the Convention as a "statute of limitations" has no bearing on this matter. Pet. Br. 6, 27. *First*, the delegate's comment was in reference to the Preliminary Draft of the Convention which had different language than the final version. *See infra* Section III. *Second*, the delegate's opinion is not a textual argument; at most, it speaks to the intent of one of the many drafters. *Third*, contrary to Petitioner's suggestion, and as discussed in Section III, *infra*, the drafting history reflects that the delegation, acting as a whole, did not intend the period to function as a statute of limitations that would be subject to tolling.

Petitioner's argument that equitable tolling should apply because of the "distinct attributes of the Convention's implementation in the United States" is unavailing. Pet. Br. 32-34. Petitioner claims that the United States has made it difficult for left-behind parents to file petitions for return in this country within one year of removal because ICARA requires them to locate the child with enough specificity to file suit in a court with proper jurisdiction. *Id.*; *see also* Amicus Br. of Nat'l Ctr. for Missing & Exploited Children 14-25 (explaining that in the United States, unlike some other signatory countries, a left-behind parent must engage in the time-consuming tasks of locating the child and obtaining the assistance of legal counsel). Although he avoids stating it directly, Petitioner basically suggests that this Court should import equitable tolling into the Convention in order to offset the policy choices made by Congress in implementing the Convention. However, "policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984). If Congress believes that left-behind parents should be allowed to commence Convention proceedings in a different manner, it can amend ICARA accordingly.

Petitioner argues that Article 34 of the Convention permits the application of equitable tolling because it provides that the "Convention shall not restrict the application of . . . other law of the State addressed for the purposes of obtaining the return of a child." Pet. Br. 23-25 (quoting Convention, art. 34). The materials Petitioner cites, however, do not support this interpretation. For

example, Petitioner relies primarily on the Pérez-Vera Report, which states that the Convention "explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child." Pet. Br. 23, 30 (quoting Pérez-Vera Report ¶ 39). The use of the phrase "along with the provisions of the Convention" suggests that the drafters intended that the "other legal rule" allowing for the return of the child would be outside of and separate from the Convention. *See* Dep't of State, *Legal Analysis*, 51 Fed. Reg. at 10,507-08 ("Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying other laws and procedures conducive to that end."). Rather than providing an independent remedy for obtaining the return of the child as contemplated by Article 34, equitable tolling actually alters the provisions that already are part of the Convention in the form agreed upon by the drafters and ratified by the signatory states. Petitioner's interpretation also is undercut by the scholarly articles he cites, Pet. Br. 24, 30, which suggest that domestic law should not be imported into the language of the now settled exception because doing so would be contrary to the goal of uniform interpretation of the Convention across signatories. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1080-81 (2005) (arguing that "*interpretation* of the Hague Abduction Convention itself"—including "how to deal with the one-year time period when a child has been concealed"—should be harmonized across countries); Linda

Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. of Int'l L. & Pol. 221, 245-47 (2000) (arguing that although "Hague proceedings are dependent upon national law and the procedural system in place in any particular country," the interpretation of the Convention's text should be uniform across signatories).

Petitioner fails to point to a single case, domestic or foreign, that supports his argument that Article 34 permits importation of the domestic doctrine of equitable tolling. Petitioner relies on a Special Commission meeting wherein representatives discussed whether the Convention could apply to a child who turns 16 while a petition is pending, arguing that the meeting report demonstrates that signatories regularly apply domestic law to alter Convention provisions. Pet. Br. 24-25; *see* Convention, art. 4 (stating that the Convention ceases to apply when a child turns 16). Contrary to Petitioner's suggestion, however, the Special Commission did not conclude that domestic law could be applied to "expand the return remedy beyond the plain text of the Convention." Pet. Br. 25. Rather, the delegates concluded that "nothing in the Convention prevents States from applying the Convention's mechanism *under its own laws* in cases in which the child has attained the age of 16." Permanent Bureau of the Hague Conference on Private Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ¶ 12 (1989) (emphasis added). In other words, the Special

Commission report merely reflects a consensus among signatories that once the obligation to apply the Convention ceases, nothing in the Convention precludes a country from applying the Convention's principles as part of that country's domestic law. Thus, in that situation, the Convention is being used to shape domestic law; domestic law is not changing the application of the Convention, as Petitioner advocates here.

II. EQUITABLE TOLLING IS CONTRARY TO THE PURPOSE OF THE CONVENTION AND THE ARTICLE 12 "NOW SETTLED" EXCEPTION.

Although the text of the Convention is clear that equitable tolling should not apply to the one-year period in Article 12, and accordingly, no other sources need to be consulted, *see, e.g.*, *Chan*, 490 U.S. at 134, this interpretation also is consistent with the purpose of the Convention and the Article 12 now settled exception. This Court frequently has looked to the "objects and purposes" of a treaty to help guide its analysis. *See Abbott*, 103 S. Ct. at 1995; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991).

As stated in the first sentence of the Convention's preamble, the underlying goal of the Convention is to protect the best interests of the child. Convention, preamble (stating that the signatories are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody"); *Abbott*, 130 S. Ct. at 2010 (Stevens, J., dissenting) ("At bottom, the Convention aims to protect the best interests of the child."); Pérez-Vera Report ¶ 24 ("[T]he struggle against the

great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests."); Amicus Br. of Reunite Int'l Child Abduction Ctr. ("Reunite Amicus Br.") 11-13. Indeed, the Convention aims "to secure the prompt return of children wrongfully removed or retained," Convention, art. 1, because the drafters presumed that, in most cases, return would be in a child's best interests. *See* Pérez-Vera Report ¶ 25 ("[T]he two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child.'").

The drafters recognized, however, that a child's best interests would not always be served by immediate return to her country of habitual residence, and included in the Convention a number of limited exceptions to return. As explained in the Pérez-Vera Report, the Convention "recognizes the need for certain exceptions to the general obligations assumed by States" to return removed children because the drafters acknowledged that "the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected." Pérez-Vera Report ¶ 25. These exceptions—including Article 12—are "concrete illustrations" of the Convention's "guiding" principle that the best interests of the child are paramount. *Id.* Petitioner's argument that equitable tolling should be applied to the now settled exception because it prevents a removing parent from gaining

advantage through concealment is misplaced. Pet. Br. 21, 25. Rather, the one-year period in the now settled exception marks a point of transition, where the assumption that the best interests of children are promoted by swift return is undercut due to the passage of time, and the court is permitted to engage in a more individualized consideration of the best interests of the particular child. *See Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32, 43 (Eng.). Permitting equitable tolling based on the diligence of the left-behind parent would prevent a court from considering the child's interests at all, which would undermine the intention of the Convention by elevating the interests of the left-behind parent over the interests of the child.

Furthermore, equitable tolling is not necessary to address Petitioner's concern that removing parents gain an unfair advantage through concealment because the Convention allows concealment to be taken into account in other ways. For example, to the extent that the nature of a parent's concealment results in the child moving from place to place, living under assumed names or the like, those facts are likely to prevent a respondent from demonstrating that the child has become settled in her new environment. *See Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998) (finding that the child was not settled, in part, because of "the active measures" Respondents took to keep the "children's whereabouts concealed from Petitioner and the German (and other) authorities"); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363-64 (M.D. Fla. 2002) (finding that children were not settled where they had lived in seven different

locations and Respondent took "active and consistent steps to prevent contact between the children and their father"); Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 482-83 (2009) (recommending "that courts consider concealment only in so far as it impacts the determination of whether a child is settled"); *see also infra* Section V.A (discussing the approach of sister signatory states who consider the circumstances of concealment as part of the multifactor now settled analysis). In addition, the actions of the parents, including any concealment on the part of the removing parent, can be considered as part of a court's discretion to return a child even after finding the child to be settled. Although Article 12 states that a judicial or administrative authority "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment," Convention, art. 12, nothing in Article 12 or elsewhere in the Convention prohibits that authority from returning the child even if she were found to be settled. *See Yaman*, 2013 WL 4827587, at *14 ("Article 12 in its own terms confers upon a federal district court the authority to order the return of a 'now settled' child."); *In re M*, 1 A.C. at 1304 ("[A]rticle 12 does envisage that a settled child might nevertheless be returned within the Convention procedures. The words 'shall . . . unless' leave the matter open."); Amicus Br. of U.S. (Cert. Pet.) 11. The language of Article 18 reinforces this reading. *See* Convention, art. 18 ("The provisions of this Chapter do not limit the power of a judicial or

administrative authority to order the return of the child at any time.").[10]

III. THE NEGOTIATING HISTORY OF THE CONVENTION CONFIRMS THAT THE ONE-YEAR PERIOD IN ARTICLE 12 SHOULD NOT BE SUBJECT TO EQUITABLE TOLLING.

Both the text and purpose of the Convention are clear that Article 12's one-year period is not subject to equitable tolling, and that strongly is reinforced by the Convention's negotiating history. Because "[t]reaties are construed more liberally than private agreements," *Saks*, 470 U.S. at 396, a court may "consider[ ] as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*)," *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

The drafting history of Article 12 establishes that the Convention delegates did not intend equitable tolling to apply to the one-year period. The now settled exception and its one-year period were the result of a carefully constructed compromise, wherein the delegates overwhelmingly rejected draft language that provided two periods, the longer of which (one year) would be invoked in cases of concealment. Concerns expressed by some delegates

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[10] Petitioner agrees that courts have discretion to return a settled child, although he states that such discretion arises from Article 18. Pet. Br. 40. In order to decide this case, it is not necessary for the Court to determine the source of such discretion.

that the one-year period was too short were assuaged by the requirement that the respondent demonstrate that the child is now settled, and a court's ability to return the child even where the child is found to be settled. *See* Weiner, *Uprooting*, 33 Fordham Int'l L.J. at 432-43 (concluding that the Article 12 drafting history "demonstrates that delegates rejected proposals that would have required judges to consider the respondent's concealment and the petitioner's due diligence"); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 Law & Contemp. Probs. 209, 246-47 (1994) ("The time limits and discretion addressed in Article 12, ordering return after one year unless the child is settled in its new environment, are the product of an important compromise in the treaty process."). Importing equitable tolling into Article 12 to extend the one-year period on an *ad hoc* basis would upset the balance struck by the delegates.

As Petitioner acknowledges, Pet. Br. 5-7, the Convention drafters considered, and ultimately rejected, draft language that included a longer time period in Article 12 in cases of concealment. The Preliminary Draft of the Convention provided for two periods in Article 12 (Article 11 in the draft): (1) where a parent knew the location of the child, the child would be returned forthwith if the petition were filed six months from "the date of the breach of custody rights"; and (2) where the residence of the child were unknown, the period of six months "shall run from *the date of the discovery of the child*, subject to the proviso that the total period shall not exceed one year from the date of the breach." *Preliminary*

Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera, in 3 Actes et Documents 166, 168 (emphasis added). The two-time period approach that was under consideration recognized that concealment could be an issue in these types of cases. In fact, Canada wrote in its comments on the Preliminary Draft that concealment would be present in the "classic abduction case, [where] the child's place of refuge will not usually be known at the time of the 'breach of custody rights.'" *Comments of the Governments on Preliminary Document No 6*, in 3 Actes et Documents 215, 231-32 (Canada) ("*Comments of the Governments*").[11] As Petitioner emphasizes, the United States particularly was concerned that the time periods in the Preliminary Draft did not adequately account for problems of concealment. Pet. Br. 6-7. In its written comments on the Preliminary Draft, the United States expressed concern that the periods of six months and one year would not be long enough "to locate a child and to bring proceedings in an appropriate court" and "may benefit those abductors who have the financial means and the aid of relatives or friends to arrange for life underground, perhaps moving from place to place to avoid detection." *Comments of the Governments*, at 242 (United States). Thus, the United States initially advocated for the periods to be extended to one and two years. *Id.*

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[11] *See also Comments of the Governments*, at 232 (Canada) (explaining that the extension of time was provided to account for "the case of an abductor who, to escape legal proceedings, constantly changes his residence and does not establish himself anywhere in the first months of the abduction").

Despite the concerns raised regarding concealment that led to discussion of having two periods, the drafters worried that determining the "date of discovery" would be difficult and, thus, rejected the two-period approach. *See* Pérez-Vera Report ¶ 108. In response to the Preliminary Draft, Canada wrote that "where the starting point is that of the discovery of the child, the provision may pose some problems of interpretation, particularly in cases of subsequent removals after the discovery of the child." *Comments of the Governments*, at 232 (Canada). The delegate from the United Kingdom agreed that "considerable difficulty might be encountered as regards the date of 'discovery' of the child." *Procès-verbal No 7*, in 3 Actes et Documents 290, 291 ("*Procès-verbal No 7*"). Accordingly, the delegates rejected the two-period approach in favor of a single period that did not vary based on discovery of the child's whereabouts or concealment. The proposal to use a single time period was approved decisively by a vote of 20 to 3. *Id.* at 292.

Next, the delegates carefully considered the appropriate length of the single time period in Article 12. The United States again raised the issue of concealment and advocated for a period of 18 months or longer in order to allow enough time for a left-behind parent to "locat[e] the child and the abductor." *Procès-verbal No 7*, at 292. Nevertheless, other representatives emphasized the interests of the child, and expressed concern that too long a period would allow a child to form attachments to her new country such that return would be disruptive. *See id.* (comments of Ireland, Spain). After much debate, the delegates overwhelmingly decided on a

period of one year. The one-year period that was selected was the same length as the longer period proposed under the two-time-period approach for cases involving concealment. The one-year period was approved by a vote of 21 to 4. *Id.* at 292-93.

In her explanatory report, Pérez-Vera extolled the benefits of this change: "[T]he establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement" because it eliminated the "inherent difficulty in having to prove the existence of those problems which can surround the locating of the child." Pérez-Vera Report ¶ 108. Although Pérez-Vera described the one-year period as "perhaps arbitrary," she also stated that "[it] nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard." *Id.* ¶ 107.

Even after deciding on a single one-year time period, the drafters remained sensitive to the concerns raised by delegates regarding the "consequences flowing from the imposition" of the one-year period. *Procès-verbal No 7*, at 295 (comments of Germany). However, the drafters did not discuss equitable tolling as a solution. Rather, they intended that the concerns would be assuaged in two other ways: a requirement that it be demonstrated that the child is now settled in order to permit the child to remain; and the ability to return the child at any time pursuant to Article 18. *Id.*

First, Germany offered a proposal that for two additional years after the one-year period elapsed, a country still be required to return a child, unless "the

child was now settled in his new environment." *Id.* When initially proposing this addition, Germany explained that requiring a demonstration that the particular child is settled could take into account "the circumstances of the individual case and the [child's] varying readiness and capability to acclimatize himself." *Comments of the Governments*, at 216 (Germany). The representative from the United States stated that Germany's proposal helped mitigate her concerns that "the one-year time-limit could be abused by certain people seeking to avoid the application of the Convention," particularly by those who constantly moved the child from location to location. *Procès-verbal No 10*, in 3 Actes et Documents 312, 315. The proposal was approved by a vote of 14 to 10, with the United States in the majority, and led to the "now settled" language of Article 12. *Id.* at 316.

Second, the Convention delegates also understood that the one-year period in Article 12 was balanced by Article 18 (Article 15 in the Preliminary Draft), which permitted a court to return a child at any time even if the child were found to be settled. *See Procès-verbal No 7*, at 292 (comments of Greece, Italy), 295 (comments of the United States, United Kingdom); *see also* Pérez-Vera Report ¶ 112 (explaining that Article 18 might be invoked "particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment").

In light of the drafting history of the now settled exception, it would be inappropriate for the Court to interject equitable tolling into Article 12, thus undoing the careful balance struck by the delegates. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989) (refusing to apply equitable tolling to 60-day notice period where doing so would frustrate the "compromise" struck by Congress); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980) (rejecting equitable tolling because "[w]e must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction."); *see also In re M*, 1 A.C. at 1308 ("The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction.").

Contrary to the suggestion of Petitioner and at least one *amicus*, *see* Pet. Br. 4, 6-7; Amicus Br. of Int'l Academy of Matrimonial Lawyers ("IAML Amicus Br.") 11-12, it also would be inappropriate to weigh more heavily the opinions expressed by the United States delegate during the drafting process, which do not reflect the intent of the drafters as a whole. *See United States v. Stuart*, 489 U.S. 353, 374 (1989) (Scalia, J., concurring in the judgment) ("[W]hatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding."); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994) (in the context

of statutory interpretation, discounting various legislators' "partisan statements" because they "cannot plausibly be read as reflecting any general agreement"); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (observing that "the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history"). To the extent the Court finds the unilateral views of the United States delegate instructive, her concerns regarding the length of the one-year period were assuaged by the addition of the "now settled" language, in favor of which the United States voted, and the United States ultimately ratified the Convention as written. Indeed, the concerns repeatedly expressed by the United States delegate regarding the length of the time period that would be set in Article 12 actually support the conclusion that she did not assume that equitable tolling would be available.

IV. THE UNITED STATES GOVERNMENT AGREES THAT THE ONE-YEAR PERIOD IN ARTICLE 12 SHOULD NOT BE SUBJECT TO EQUITABLE TOLLING.

"It is well settled that the Executive Branch's interpretation of a treaty is 'entitled to great weight.'" *Abbott*, 130 S. Ct. at 1993 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)). As this Court held in *Abbott*, "[t]he Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation . . . including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country." *Id.*

In two amicus briefs, one solicited by the Second Circuit and one solicited by this Court, the United States has agreed that the one-year period should not be subject to equitable tolling. In its amicus brief recommending that this Court grant *certiorari*, the Solicitor General wrote:

> Article 12's one-year period is not subject to equitable tolling because it is not a statute of limitations that governs the time in which a claim must be filed or be barred entirely. Instead, the expiration of the one-year period permits a court, in deciding on the merits whether return is appropriate, to consider whether the child has become settled in its new environment. The court retains equitable discretion under Article 12 to order that a child who is now settled in the United States should nonetheless be returned, and concealment or other misconduct is a factor that the court may consider.

Amicus Br. of U.S. (Cert. Pet.) 9; *accord* Pet. App. 175a-188a.

The current position of the United States is consistent with its position at the time of the Convention's ratification. In its 1986 Legal Analysis of the Convention in connection with the ratification proceedings, although the State Department recognized that conduct of the removing parent could be relevant, it did not specify that such conduct should be considered through the application of equitable tolling. Rather, it stated that "[t]he reason for the passage of time, which may have made it

possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition," and that "it is highly questionable whether the [removing parent] should be permitted to benefit from such conduct absent strong countervailing considerations." 51 Fed. Reg. at 10,509. That position is consistent with the Government's current position that concealment can be considered as part of a court's discretion to return a settled child.

Petitioner argues that a response made by the United States Central Authority to a questionnaire in 2006 negates the weight of the clear position the Executive Branch has adopted in opposing equitable tolling. Pet. Br. 39 (citing Hague Conference on Private Int'l Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (2006)). However, the questionnaire response contains no analysis of the Convention's text or drafting history, and is largely a summary of existing United States case law. As compared with the detailed and considered amicus briefs the Government has filed in this case, the questionnaire should be given little weight. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that the persuasive weight given to an Executive Branch position depends on "the thoroughness evident in its consideration, the validity of its reasoning"); *Yaman*, 2013 WL 4827587, at *11 (assigning little, if any, weight to the 2006 questionnaire); *see also Sumitomo*, 457 U.S. at 184 n.10 (giving weight to views of the United States expressed in amicus brief despite being contrary to a

prior position because prior interpretation also was post-ratification and not indicative of the state of mind of the drafters).

V. THE SUBSEQUENT UNDERSTANDING OF THE CONVENTION SIGNATORIES DEMONSTRATES THAT THE ONE-YEAR PERIOD IN ARTICLE 12 SHOULD NOT BE SUBJECT TO EQUITABLE TOLLING.

Both the decisions of foreign courts and a post-ratification Special Commission meeting demonstrate the understanding of Convention signatories that Article 12's one-year period is not subject to equitable tolling.

A. Courts in Signatory Countries Uniformly Reject Equitable Tolling.

In interpreting treaties, this Court gives "considerable weight" to the "opinions of our sister signatories." *Abbott*, 130 S. Ct. at 1993 (quoting *El Al Israel Airlines*, 525 U.S. at 176). This principle applies with "special force" in the context of the Convention because "Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Id.* (quoting ICARA, 42 U.S.C. § 11601(b)(3)(B)). Contrary to Petitioner's suggestion that only courts of last resort are relevant to the analysis, Pet. Br. 46-47, this Court has examined both courts of last resort and lower courts to ascertain sister signatories' understanding of a treaty provision. *See, e.g.*, *Abbott*, 130 S. Ct. at 1993-95 (considering the opinions of intermediate courts when analyzing the Convention); *Saks*, 470 U.S. at 404 (considering opinion of

intermediate French court (Cour d'appel de Paris) and opinions of European "legal scholars").[12]

Petitioner does not—because he cannot—point to any sister signatory that has adopted equitable tolling. Indeed, equitable tolling appears to have been rejected by every foreign country that has considered the issue.

First, in the United Kingdom, the Court of Appeal for England and Wales confronted a case where the removing parent had concealed the child (taking such extreme measures as arranging for the child to take over the birth date and name of a child who had died) and concluded that even where an "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." *Cannon*, 1 W.L.R. at 34, 47. Tolling, the court reasoned, was "too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome." *Id.* at 47-48.

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[12] Contrary to Petitioner's suggestion, Pet. Br. 46, *Olympic Airways v. Husain*, 540 U.S. 644 (2004), does not stand for the proposition that the opinions of sister signatories' intermediate courts should be disregarded. There, the Court examined foreign intermediate courts and observed that the foreign cases considered were "not inconsistent" with the decision reached by this Court. 540 U.S. at 655 n.9. To the extent the Court's precise analysis differed from that of the foreign courts, it was because "there [were] substantial factual distinctions between these cases," in addition to the fact that the courts of last resort had yet to speak. *Id.* As discussed *infra*, the intermediate foreign courts that have rejected tolling addressed scenarios similar to the facts of this case.

Rather, the court concluded that concealment could be considered as part of the analysis of whether the child were settled. *Id.* at 48-49.[13] In rejecting tolling, the court adopted the reasoning of the lower court decision that the one-year period marks "'the juncture in a child's life where the Hague judge's legitimate policy objective shifts from predominant focus on the Convention's aims (for the benefit of the subject child in particular and of potentially abducted children generally) to a more individualised and emphasised recognition that the length and degree of interaction of the particular child in his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints.'" *Id.* at 43 (quoting *In re C*, [2004] EWHC 1245 (Fam) [105] (Eng.));[14] *see also* Reunite Amicus Br. 20-22.

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[13] The court's holding that "[i]n cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and physical settlement is much increased" was merely a rearticulation of its conclusion that concealment is relevant to the application of the now settled exception and that it may be difficult for a parent to prove that a concealed child is settled. *Id.* at 49; *see also* Reunite Amicus Br. 24. Petitioner misreads the case when he interprets this language to mean that the court looked to its "domestic common law" to apply a "higher burden of proof under the settled inquiry in cases of concealment." Pet. Br. 48-49. Rather, the court was explaining that concealment could be considered through the Convention's own mechanisms—the Article 12 now settled inquiry—as opposed to equitable tolling.

[14] *In re C* is available at http://hcch.net/incadat/fullcase/0596.htm.

Although the British House of Lords has not addressed equitable tolling explicitly, it has articulated an understanding of the Convention and Article 12 that is inconsistent with the application of equitable tolling. In *In re M*, the court considered whether it has discretion to return a settled child. 1 A.C. 1288. In approaching the analysis, the majority opinion expressed the view that the Convention is not "principally concerned with the rights of adults," but rather the rights of children. *Id.* at 1298. The court explained that this was particularly true in cases where the now settled exception has been raised, which it described as the most "child-centric" of all exceptions. *Id.* at 1311. In determining that the court did possess discretion to return a settled child, the majority noted that concealment could be considered as part of that discretionary analysis. *Id.* at 1304. The court ultimately declined to return the child because it concluded that "[t]hese children should not be made to suffer for the sake of general deterrence of the evil of child abductions worldwide." *Id.* at 1310.

Petitioner asserts that *In re H*, [2000] 2 FLR 51 (Eng.)[15] "embraced" equitable tolling. Pet. Br. 22, 47-48. Petitioner is wrong. As an initial matter, *In re H* is from the English trial court and thus, to the extent it disagrees with the rule of law set forth in *Cannon*, which was a subsequent decision of the higher Court of Appeal, it is no longer good law. *See Cannon*, 1 W.L.R. at 50 (stating that it "settle[s] issues arising

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[15] *In re H* is available at http://www.hcch.net/incadat/fullcase/0476.htm.

under Article 12(2) *definitively*, at least at this appellate level" (emphasis added)). Moreover, *In re H* did not "embrace" equitable tolling. Although the court recognized that the removing parent's concealment was "a relevant matter in considering whether or not the children had settled," the court expressly reached the question of whether the children were settled, which it would not have done at all if it had applied equitable tolling. *In re H*, 2 FLR at 55.

Second, New Zealand also has rejected equitable tolling. In *H.J. v. Secretary for Justice*, [2006] NZFLR 1005 (N.Z.), as upheld in *Secretary for Justice (New Zealand Central Authority) v. H.J.*, [2006] NZSC 97, [2007] 2 NZLR 289 (N.Z.), the Wellington Court of Appeal reviewed the doctrine of equitable tolling as applied in the American case law, and concluded that "[w]e are not attracted by the equitable tolling approach," reasoning that the now settled exception is not "one of limitation," but rather "one of substance." [2006] NZFLR 1005, para. 53. In affirming the decision of the Court of Appeal, the Supreme Court of New Zealand explained that any "policy implications of not letting a parent gain an advantage from concealment or deceit" should not be built into the settled analysis, except to the extent concealment impacts whether a child is settled. *Sec'y for Justice*, 2 NZLR 289, para. 69. Rather, the court said concealment should

be addressed as part of a court's equitable discretion. *Id.*[16]

Third, Canada has declined to adopt equitable tolling. The Court of Appeal for British Columbia considered a case where a child allegedly had been concealed by a removing parent, causing the left-behind parent to file the petition more than a year after removal. *Kubera v. Kubera*, [2010] BCCA 118, paras. 5-23. The court acknowledged that some American courts had "imported" the doctrine of equitable tolling to account for delay, but declined to adopt that approach. *Id.* at para. 64. Instead, the court first conducted a factual inquiry into whether the child was settled, and then balanced the child's situation against the policy objectives of the Convention, namely rapid return of the child, restoration of the status quo and deterrence of child abduction. *Id.* at paras. 70-98. The court recognized that the factual now settled inquiry

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[16] The Supreme Court of New Zealand did not (as Petitioner asserts, Pet. Br. 51) apply legal rules from its own domestic law to address concealment, but rather explained how concealment could be addressed within the Convention. Although New Zealand has implemented the Convention by translating its provisions into domestic legislation, the Care of Children Act 2004, the relevant provision discussed in these cases, Section 106(1)(a), incorporates the "now settled" exception of Article 12. *Sec'y for Justice*, 2 NZLR 289, para 44. Although the Care of Children Act states that courts have discretion to return a settled child pursuant to Section 106(1)(a), the court noted that the same discretion exists in Article 12 of the Convention. *Id.* at para. 37.

> seeks to determine the actual circumstances of the child in terms of the disruptive effect of ordering his or her return. The exception reflects a compromise between an indefinite extension of the obligation to return the child, and a recognition that the justifications for that obligation do not persist indefinitely. Beyond one year, the interests of a particular child in not being uprooted may begin to outweigh the generalized objectives of the Convention.

Id. at para. 66; *see also id.* at para. 84 ("[T]he benefit of sending a message to would-be abductors must not blind the court to the cost paid by the settled child."). Accordingly, the court noted that concealment by a removing parent "would almost certainly be relevant to the question of what weight should be given to the objective of deterrence in the overall balance," but it "should not, however, have any bearing on the question of factual integration, unless the concealment or delay interfered with the child's ability to settle in the new environment and community." *Id.* at para. 47; *see also id.* at para. 69 ("[I]ssues as delay or deception, if taken into account in determining the child's actual circumstances, may have the result of manipulating the factual inquiry to the point of meaninglessness . . . ."). Thus, the court concluded that issues of concealment should

not prevent a court from examining a child's ties to her new environment.[17]

Fourth, Hong Kong also has rejected the application of equitable tolling to the one-year period in Article 12. In *A.C. v. P.C.*, [2005] HKEC 839, the Hong Kong Court of First Instance adopted the reasoning of *In re C*, [2004] EWHC 1245 (Fam), and the American decisions of *Anderson v. Acree*, 250 F. Supp. 2d 872 (S.D. Ohio 2002), and *Toren v. Toren*, 26 F. Supp. 2d 240 (D. Mass. 1998), to conclude that "even though the children have been the victims of deliberate concealment by the father, that concealment has not suspended the passing of time under art. 12(1)." [2005] HKEC 839, para. 55. Although the court also reviewed American case law that favored tolling, as Petitioner notes, Pet. Br. 49, the court rejected the approach of those cases. The Hong Kong court reasoned:

> [O]ne of the principal objects of the Convention is to secure the best interests of abducted children rather than punishing those who abduct them. That being the case, even if there has been morally reprehensible conduct on the part of the abductor, a time must be reached when, if the circumstances so dictate, it harms rather than helps children to order their return.

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[17] Again, the Court of Appeal did not apply legal rules or methods from its own existing domestic law to address concealment.

A.C., [2005] HKEC 839, para. 48; *see also id.* at para. 54 ("Surely a point of transition must be reached when the Convention's objective of prompt return by way of summary proceedings loses its rationale and when to order the return of a child, notwithstanding any moral culpability on the part of the abducting parent, becomes fundamentally disruptive and (almost as bleak) a fundamentally artificial process."). The Hong Kong court recognized that concealment could be relevant in determining whether a child is settled under Article 12. *Id.* at para. 60.[18]

B. A Special Commission Meeting Reflects the Consensus that the One-Year Period in Article 12 Should Not Be Subject to Equitable Tolling.

A post-ratification Special Commission meeting further reflects the understanding of Convention signatories that equitable tolling is not applicable to Article 12. At Special Commissions, delegates from the Convention signatory states meet to discuss the application of the Convention. Because there is no supranational tribunal "to provide uniform interpretation of the Child Abduction Convention, the Special Commissions are a valuable resource in developing 'best practices' and interpretations of the Child Abduction Convention." Silberman, *The Hague Child Abduction Convention Turns Twenty*, 33 N.Y.U. J. Int'l L. & Pol. at 228-29 n.28. At the

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[18] Like the other foreign cases, the Hong Kong court did not apply legal rules or methods from its own existing domestic law to address concealment.

2006 Special Commission, the delegates discussed the time period in Article 12. *See* Permanent Bureau of the Hague Conference on Private Int'l Law, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Oct. 30-Nov. 9, 2006)* 46 (2006). According to the meeting report, a representative from Switzerland sought to reduce the length of the time period and "presented some situations where the time period could be more flexible, such as when the child was hidden." *Id.* The proposal was not accepted because "[t]he Special Commission agreed . . . the Article 12 time period of one year . . . represented a good balance between the best interest of the child and the rights of the left-behind parent." *Id.*[19]

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[19] Contrary to the suggestion by two *amici*, *see* IAML Amicus Br. 6; Amicus Br. of A Child is Missing, Inc., *et al.* 20-26, the interpretation of the Convention should not be influenced by a desire to conform with the language of subsequent international treaties, such as the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996) ("Hague Jurisdiction Convention"). The Hague Jurisdiction Convention provides that in cases of removal, jurisdiction shifts to the state where a child has been taken only where "the child has resided in that other State for a

VI. AFTER CORRECTLY HOLDING THAT THE ONE-YEAR PERIOD IN ARTICLE 12 CANNOT BE EQUITABLY TOLLED, THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE ITS EQUITABLE DISCRETION TO RETURN THE CHILD.

In the alternative, Petitioner asks this Court to hold that concealment of the child by the removing parent and diligence of the left-behind parent are "a necessary part" of a court's exercise of equitable discretion. Pet. Br. 22, 53-54. As an initial matter, this Court need not reach this issue because it is beyond the scope of the question presented. Moreover, to the extent that Petitioner suggests that

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period of at least *one year after the [left-behind parent] has or should have had knowledge of the whereabouts of the child*, no request for return lodged within that period is still pending, and the child is settled in his or her new environment." Hague Jurisdiction Convention, art. 7(1)(b) (emphasis added). The Court should not rely on this language because the treaty states specifically that it "shall not affect the application" of the Convention and the United States has not ratified the treaty. Hague Jurisdiction Convention, art. 50; *see Eastern Airlines*, 499 U.S. at 550 (refusing to give dispositive effect to language included in a subsequent protocol not yet ratified by the United States). If the signatories wish to amend the Convention to conform with the language in the subsequent Hague Jurisdiction Convention, they are free to do so, but that is not the role of this Court. *See El Al Israel Airlines*, 525 U.S. at 171 n.12 ("Postratification adjustments . . . are appropriately made by the treaty's signatories."). Even if the Court were to consult this language, it actually confirms that the one-year period in the Convention should not be subject to equitable tolling; as the Hague Jurisdiction Convention shows, the drafters easily could have stated that the one-year period runs from the date of discovery, rather than the date of removal, but they did not.

concealment and diligence should be emphasized above other factors that a court might consider as part of its discretion, that position is contrary to the balance struck by the Convention's drafters between the interests of left-behind parents and the best interests of the child. Petitioner cites no authority to support his position. In fact, Petitioner's suggestion is contrary to the approach of at least one foreign court. The British House of Lords determined that a court should be free to consider a wide variety of factors when exercising its discretion, including the overarching Convention goals and the best interests of the individual child. *See In re M*, 1 A.C. at 1307 ("The court is entitled to take into account the various aspects of the Convention Policy, alongside the circumstances which gave the court a discretion in the first place and wider considerations of the child's rights and welfare."). The court held that the weight given to each factor should be determined on a case-by-case basis. *Id.* (disagreeing with the proposition that "the Convention objectives should always be given more weight than the other considerations," concluding that "[s]ometimes they should and sometimes they should not"). The court further noted that in now settled cases where a year already has passed since removal, the general Convention objective of swift return actually should be given less weight. *Id.* ("[T]he further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.").

If, however, Petitioner is suggesting merely that courts should consider the facts bearing on concealment and diligence when exercising equitable

discretion in cases where the court has determined that the child is settled, that is exactly what already was done by the district court in this case, and affirmed by the Second Circuit. In analyzing whether to exercise its discretion to return the child to the United Kingdom despite finding her settled in the United States, the district court expressly weighed the actions of both parents and the best interests of the child. Pet. App. 112a-14a. Ultimately, the district court determined that due to the child's fragility, returning her to the United Kingdom "potentially would be traumatic enough" that it outweighed Petitioner's arguments regarding the equities. Pet. App. 113a. Thus, the district court already performed the analysis requested by Petitioner and decided not to exercise its discretion to return the child.[20]

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[20] One area where Petitioner and Ms. Montoya Alvarez agree—contrary to the position taken by the Government—is that the Convention does not give courts discretion to skip entirely the now settled analysis. Pet. Br. 42. In its prior amicus briefs, the Government has not provided any support in the Convention for that position. Rather, allowing courts to skip the now settled analysis would be contrary to the purpose of the exception, which is designed to ensure that the best interests of the child will be examined after one year has passed. *See supra* Section II. Although the Convention gives the court discretion to return the child if the Convention's goals of return and deterrence outweigh the interests of the child in remaining in her new environment, the Convention does not allow the court to bypass this weighing process.

VII. EVEN IF EQUITABLE TOLLING APPLIED TO THE ONE-YEAR PERIOD IN ARTICLE 12, IT WOULD NOT APPLY UNDER THE FACTS OF THIS CASE.

Even if equitable tolling applied to the one-year period in Article 12, it would not change the outcome of this case. Although the district court held that the one-year period cannot be equitably tolled, it found, in the alternative, that even if tolling were available, it would not be warranted under the facts of this case. Pet. App. 101a.

First, the district court held that the Petitioner's diligence in locating the child was not sufficient enough to justify the application of tolling. Although the district court acknowledged the efforts Petitioner made to locate the child, it ultimately determined that his failure to file a petition within a year was "not excused" because he neglected to contact Ms. Montoya Alvarez's sister, Ms. Castro, in New York, even though Ms. Montoya Alvarez had visited Ms. Castro the week prior to leaving Petitioner, Petitioner had Ms. Castro's contact information in New York, and he suspected that New York was one of the places Ms. Montoya Alvarez might bring the child. Pet. App. 102a.

Second, the district court found that Ms. Montoya Alvarez "did not conceal the child to an extent that would warrant equitable tolling." Pet. App. 103a. The district court explained that Ms. Montoya Alvarez did not go to an unexpected place, did not move the child to multiple locations and did not change the child's name. *Id.* Rather, Ms. Montoya Alvarez went to the same sister she

had visited immediately prior to leaving Petitioner, enrolled the child in school under her given name and remained in one location. *Id.* Ultimately, the district court held, both on the law and the facts, that equitable tolling does not apply and that the child is now settled in the United States.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Second Circuit and hold that equitable tolling does not apply to Article 12 of the Hague Convention.

October 22, 2013

Respectfully submitted,

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CONVENTION PROVISIONS INVOLVED

1. The Preamble of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Preamble

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

2. Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

3. Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

4. Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

5. Article 18 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

6. Article 20 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

7. Article 34 of the Hague Convention on the Civil Aspects of International Child Abduction provides:

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining

the return of a child who has been wrongfully removed or retained or of organising access rights.

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-820

Supreme Court, U.S.
FILED
NOV 21 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

The Hague Convention rests on a recognition that children are best served by preventing their abduction in the first place. *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1990–91, 1997 (2010) (noting the Convention's "explicit purpose to prevent wrongful removal across international borders" and "deter[] child abductions"); Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention, Actes et Documents de la Quatorzième session: Child Abduction* (1982), ("Explanatory Report") ¶ 24, 431 (JA-303) ("[T]he right not to be removed ... is one of the most objective examples of what constitutes the interests of the child.").

The rule Petitioner asks the Court to adopt champions the interests of children because it deters and prevents abductions by ensuring that abducting parents will not benefit from concealing their child. Petitioner's position accounts not only for the child in this case, but for all children who otherwise would be the victims of abduction.

In contrast, the rules advocated by the government and by Respondent allow an abducting parent to establish the child's settlement by virtue of concealment, so long as the concealment is not "active" or "egregious." While this standard may save an individual child from experiencing the temporary disruption of provisional return, it does so at the cost of rewarding, and thus encouraging, abduction and concealment of children generally.

The crux of the government's argument is that the availability of equitable tolling would "disrupt the balance of interests struck in Article 12," Govt. Br. 30, because, according to the government, the delegations "intended that the one-year time limit

would apply regardless of difficulty in locating the child." *Id.* at 8. This contention is erroneous.

Article 12 does not exist in a vacuum. The "balance of interests" struck in the Convention includes Article 18, which permits return "at any time" and Article 34, which, as the government concedes, "allows for the use of ... domestic law to effectuate the return of a child." Govt. Br. 30. Indeed, as the Explanatory Report emphasizes, the Convention contemplates petitioners in Convention proceedings "invoking other provisions more favorable to the attainment of [return].... *particularly* in the situations envisaged in the second paragraph of Article 12, *i.e.*, where, as a result of an application being made to the authority after more than a year has elapsed since the removal, the return of the child may be refused ...." Explanatory Report ¶ 112, 460 (JA-368) (emphasis added).

Following a different but equally erroneous path, Respondent argues that Article 12 "reflects the judgment" that ordering return of a settled child for a custody determination is not in the child's "best interests," Resp. Br. 6, and that equitable tolling would place Petitioner's "interests above those of his child." *Id.* at 2. Respondent overlooks the plain text of the Convention as a whole and misperceives the role of "best interests" in Convention proceedings.[1]

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[1] In an attempt to disparage Petitioner, Respondent alludes to her allegation that Petitioner abused and raped her. Resp. Br. 1, 7. While such allegations have no bearing on the legal issue before the Court, it is worth noting that the district court found insufficient evidence to support Respondent's allegations, Pet. App. 5a, 89a–90a, 46a–47a, and rejected her "grave risk" defense premised upon them, *id.* at 91a, a finding Respondent did not cross-appeal.

I. The Text of the Convention Establishes Its Particular Scope and Function.

To answer the Question Presented, it is crucial to bear in mind the scope and function of the Convention, as evidenced by its text.

The "problem with which the Convention deals" is a particular one: "individuals establishing legal and jurisdictional links which are more or less artificial." Explanatory Report ¶ 15, 429 (JA-297). The Convention and ICARA thus limit the scope and function of courts adjudicating petitions to considering only the question of whether the wrongfully abducted child shall be provisionally returned. For this reason, Respondent's numerous references—23 times in her brief—to the "best interests" of the child misrepresents the proper analysis of the Hague Convention. A court is not to endeavor to decide "best interests."[2]

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[2] *See* Explanatory Report ¶ 23, 431 (JA-302) ("[T]he Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure prompt return."); *id.* ¶ 21, 431 (JA-301) ("'[B]est interests of the child' ... resemble[s] more closely a sociological paradigm than a concrete juridical standard."); *id.* ¶ 25, 432 (JA-303–04) ("[T]he two objects of the Convention—the one preventive, the other designed to secure [return] ... correspond to a specific idea of what constitutes the 'best interests of the child.'"); *accord NCMEC Training Manual, Litigating International Child Abduction Cases Under the Hague Convention*, 61 (2012) (describing proceeding as "purely jurisdictional" and referring to "best interests of the child" as "often-used but invalid defense"); *accord* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 32–33 (1984) (warning "Beware the Child Savers" and stating "[c]ertainly it is hard to quarrel with rhetoric about the child's best interests, ... [but] attempts to frustrate return under the guise of best

In deciding whether a child who was wrongfully abducted more than one year before a petition is filed shall be returned provisionally for a custody proceeding, a lower court is to consider, *inter alia*: (i) Article 12, which mandates the child be returned unless she is "now settled," (ii) Articles 13 and 20 which, like Article 12, establish bases on which the court may, but is not obligated to, deny return, (iii) Article 18, which empowers a court to order return of an abducted child "at any time," and (iv) Article 34 which permits a left-behind parent to "invok[e], along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of the child." Explanatory Report, ¶ 39, 436 (JA-368).

In deciding whether return is proper, the court also should consider whether terms and conditions of return, *i.e.*, undertakings and/or mirror-image orders, may mitigate risks or disruption of return. *See* 42 U.S.C. § 11604(a) (Pet. App. 122a); *see also NCMEC Training Manual, Litigating International Child Abduction Cases Under the Hague Convention*, 56 (2012); FEDERAL JUDICIAL CENTER, J. GARBOLINO, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR

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interests ... undermine the Convention"); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U.J. INT'L L. & POL. 221, 247 (2000) (emphasizing that "individual 'best interest' assessments ... pull[] the first thread in unraveling the fabric of Child Abduction Convention."). Indeed, concerns that proceedings would turn into best-interest assessments led both the Department of Justice and the Administrative Office of the United States Courts initially to oppose federal court jurisdiction for Convention proceedings. International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the H. Comm. on the Judiciary, 100th Cong. 117–19, 128 (1988).

JUDGES 98–102, 108–09 (2012) (discussing types of undertakings and circumstances under which mirror-image orders are appropriate).

II. Equitable Tolling Is Available as to the One-Year Period in Article 12.

A. The Arguments of the Government and Respondent as to the "Balance of Interests" in the Convention Are Belied by the Language of the Convention.

1. The government agrees with Petitioner that Article 34 "allows for the use of ... domestic law to effectuate the return of a child." Govt. Br. 30 (citing Explanatory Report ¶¶ 39–40) (stating the Convention endorses "explicitly ... a party invoking ... any other legal rule which may allow him to obtain the return of a child wrongfully removed"). The government argues, however, that courts and left-behind parents should be prohibited from using the domestic law of equitable tolling on the theory that tolling will "disrupt the balance of interests struck in Article 12."[3] *Id.*; *see also* Resp. Br. 17 and Part III therein (making similar argument that Article 12 reflects a "careful compromise").

Allowing courts and left-behind parents to use equitable tolling in cases of concealment cannot be said to "disrupt the balance of interests struck"

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[3] The government refers to a balance of interests struck "in Article 12." The proper question is what balance of interests was struck within the Convention as a whole. It is neither remarkable nor insightful that one provision in a treaty (Article 34), where applicable, might have an effect on another provision (Article 12). Articles 13 and 20 may affect Article 12, especially 12(1); Article 18 may affect Article 12(2).

because Article 34 is *part of* that struck balance and expressly permits the use of domestic law to obtain return under the Convention. *See* Pet. Br. 7–10 (showing this balance of interests was achieved during the Fourteenth Session in October 1980 when Articles 12, 18 and 34 (then-denominated as Articles 11, 15 and Working Documents 76 and 78) were extensively discussed and adopted). Nothing in the Convention text, the deliberations, the Explanatory Report, or otherwise suggests that Article 34 was intended to apply to some aspects of the Convention, but not to Article 12 and the "settled" question. To the contrary, as the Explanatory Report emphasizes, Article 18 "underlines the non-exhaustive and complementary nature of the Convention," and contemplates courts "invoking other provisions more favorable to the attainment of [return] . . . *particularly* in the situations envisaged in the second paragraph of Article 12, *i.e.*, where, as a result of an application being made to the authority after more than a year has elapsed since the removal, the return of the child may be refused . . . ." Explanatory Report ¶ 112, 460 (JA-368) (emphasis added).[4]

2. Respondent argues equitable tolling is not within the scope of domestic rules that may be used under Article 34 because, "[r]ather than providing an independent remedy for obtaining the return of the child as contemplated by Article 34," equitable tolling

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[4] The Article by which parties may "invok[e] other provisions more favorable to the attainment of return" is Article 34. *Accord* Explanatory Report ¶ 40, 436 (JA-315) (stating "the principle in article 34 ought to be extended to any provision which has a bearing upon custody rights" and "the parties may have recourse to *any rule* which promotes [return and deterrence]" (emphasis added)).

instead "alters the provisions that already are part of the Convention ...." Resp. Br. 27. But the text of Article 34 does not carve out space for only "independent remedies." That is achieved by Article 29. *See* Art. 29. Article 34 expressly provides for something different, namely, as Respondent acknowledges, for domestic law to be used "along with the provisions of the Convention" to "obtain return." *Id.* Since equitable tolling is used "along with" the Convention "to obtain return," it falls squarely within the scope of Article 34.

Nor is there support for the idea that Article 34 permits the use of domestic law only insofar as it does not "alter the provisions that already are part of the Convention." Resp. Br. 27.[5] As noted above, *supra* p. 6, Article 34 provides that parties may use domestic law to "obtain return," but not to prevent return where the terms of the Convention alone would mandate return.

3. Respondent and the government also argue that equitable tolling would undermine the "goal of uniform interpretation of the Convention across signatories." Resp. Br. 27. It is true that uniform interpretation is a goal of treaty interpretation. But where the plain text of the Convention provides for courts and parties to use domestic law for specific purposes, courts cannot "pursue uniformity in derogation of otherwise applicable law." *Zicherman* v. *Korean Air Lines Co., Ltd, et al.*, 516 U.S. 217, 231

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[5] The government's argument that equitable tolling would "trump" the settled analysis fails for similar reasons and is undermined by the fact that the equitable discretion approach it advocates would permit a court to "trump," the settled analysis as well, by either forgoing it or returning a child found to be settled.

(1996); *id.* at 225–26 (rejecting argument that provision for domestic law to define cognizable harm under Article 24 of Warsaw Convention was intended to govern only procedural issues where "natural reading" of language provided otherwise). This is especially true here because, through the Hague Convention Special Commission process, delegations of other Contracting States were apprised in 2006 of the United States' use of equitable tolling and none objected or expressed concern. Pet. App. 184a–85a. Accordingly, the availability of equitable tolling in some cases in the United States does not threaten to undermine the Convention or its interpretation. Moreover, insofar as no other high court of a sister signatory has addressed this issue, a decision by this Court endorsing equitable tolling may influence other sister signatories to adopt tolling. *See* Amicus Br. of NCMEC 33–35. That outcome also would benefit parents whose children are abducted from the United States and concealed abroad such that the concealment delays the timely filing of a petition. *Id.* at 35.

B. The Time Period in Article 12(2) Is a Limited Statute of Limitations.

1. Neither Respondent nor the government gives any persuasive reason to distinguish this case from *Young* v. *United States*, 535 U.S. 43 (2002). *See* Resp. Br. 23–24; Govt. Br. 27–28. The significance of the period in *Young*—and the reason it serves the "basic policies [furthered by] all limitations provisions," *id.* at 47, despite not eliminating entirely the IRS's ability to collect the debt—is that it altered what the IRS had to do to collect that debt. Before expiration of the lookback period, the IRS could rely upon 11 U.S.C. § 523(a)(1)(A) to bar discharge of the tax debt

by showing merely that the debt arose from a refund due within the period. After expiration of the period, the IRS had to prevail on a different question to bar discharge.[6] The same is true under Article 12: If the petitioner does not file within one year, he may still obtain return under the Convention, but needs to prevail on a different question to do so.

Article 12's one-year period is a statute of limitations for the same reasons the lookback period is. A petition filed within the one-year period commences a summary proceeding with—absent other exceptions—only one possible outcome with respect to a wrongfully removed or retained child: an order of return. The court is without discretion to deny return and cannot consider the "settled" question. After expiration of the one-year period, however, the nature of the claim is materially different even though the ultimate remedy sought is the same. The petitioner must prevail on a different question (whether the child is settled) that is not at issue if he or she is able to file before expiration of the time period. The proceeding is transformed into a broad factual dispute over whether the child is "now settled" in the United States.

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[6] The Court in *Young* explained that specific *equitable* remedies might be available after the lookback period elapsed and the IRS also still had other *legal* remedies after that expiration as well. *Young*, 535 U.S. 43, 47–48 & n.1 (2002). For example, the IRS could have barred discharge via another subsection of 523(a)(1), namely subsection (C), by prevailing on the question of whether "the debtor ... willfully attempted in any manner to evade or defeat such tax." § 523(a)(1)(C); *see, e.g.*, *Tudisco* v. *IRS (In re Tudisco)*, 183 F.3d 133 (2d Cir. 1999) (holding, under § 523(a)(1)(C), tax debt not dischargeable because debtor willfully evaded payment).

In both cases, the changes in the nature of the claim after the period elapses serve the purpose of any statute of limitations by creating an incentive for claims to be asserted in a timely manner. Respondent is correct that the one-year period marks the point at which return requires "longer proceedings" that "examine the child's ties to her new environment." Resp. Br. 23; *accord* Govt. Br. 27. But that simply supports the point that Article 12's one-year period, like the period in *Young*, is a statute of limitations.[7]

Finally, the government suggests the one-year period cannot be a statute of limitations because it "triggers a substantive [settled-child] defense." Govt. Br. 26. This argument fails for two reasons. First, "the 'substantive-procedural' distinction" is "of little help in deciding the question ...." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424 (1965). As the Court observed in *Young*, where the government repudiated

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[7] Sections 523(a)(1)(A) and (C) provide one example in which different avenues may exist to obtain the same remedy (*i.e.*, barring discharge of a debt). Such examples are not limited to the bankruptcy context. For example, a dispute involving the sale of goods may give rise to both a claim for breach of contract, in New York governed by a six-year statute of limitations, and a claim under the UCC, governed by a four-year statute of limitations. If an action is commenced five years after the conduct giving rise to the claims, there is no question that the UCC claim would be barred while the breach of contract claim would remain viable, even if the same relief was being sought pursuant to both claims. The burden of proof might be more onerous under the remaining contract claim, but no one could argue that the four-year UCC period is not a statute of limitations merely because the plaintiff retained the right to seek the same relief under a breach of contract theory.

this substantive-procedural dichotomy in its brief,[8] "[i]n the sense in which" the government "use[s] the term, *all* limitations periods are 'substantive.'" 535 U.S. at 49. That a period has some sort of substantive component does not transform that period into something other than a statute of limitations. *Id.* Second, characterizing the one-year period as triggering a "substantive defense" does not distinguish that period from the lookback period in any relevant sense. In *Young*, after all, the debtors' argument was not a conventional statute of limitations defense based on I.R.C. § 6502's 10-year limitation period for *collecting* taxes. Rather, their argument was that their debts were dischargeable. *Id.* at 45. And like the Article 12 settled-child exception to return, the § 523(a)(1)(A) exception to discharge is available only if the relevant period has elapsed. *See id.* at 45.

2. That the Convention grants broad equitable powers to courts adjudicating Convention petitions renders the presumption in favor of tolling particularly strong here and the availability of tolling consistent with the Court's tolling jurisprudence. *Holland* v. *Florida*, 130 S. Ct. 2549, 2560–61 (2010) (holding presumption's strength is "reinforced" when equitable principles govern the subject matter and in

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[8] The government argued there: "Even if the time limit were deemed to be 'substantive,' courts have often applied equitable tolling to such time limits in the narrow circumstances where an event beyond the party's control ... prevents pursuit of the claim. 'The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme.'" Br. of the United States, *Young* v. *United States*, No. 00-1567, pp. 37–38 (citing *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 557–58 (1974)).

"area[s] of the law where equity finds a comfortable home").[9] Neither Respondent nor the government has rebutted that presumption. *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990).

3. The government and Respondent misperceive the relevance of the history of characterizations of Article 12 as a statute of limitations. For example, the government argues that the observation of the United States during a negotiation session "does not transform an explicit and firm time period in a multinational Convention into a flexible period presumed subject to equitable tolling based on background principles applied by the courts of one nation (the United States)." Govt. Br. 29–30.[10] But

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[9] While tolling is presumed to apply to a statute of limitations, *see Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990), the Court may find that tolling applies to the one-year period even if it concludes that the one-year period is not a limited statute of limitations under *Young*. Indeed, equitable tolling jurisprudence developed when statutes of limitations were not implicated. *See Bailey* v. *Glover*, 88 U.S. 342, 347 (1875) (holding equitable tolling has been "presented to the courts under several aspects where there were no such statutes [of limitations]").

[10] The government and Respondent also observe that the United States delegation was commenting on Article 11 of the Preliminary Draft (the precursor to Article 12). Govt. Br. 29–30; Resp. Br. 25 n.9. Petitioner agrees. But the relevant fact is that, under both Article 11 in the Preliminary Draft and Article 12 in the final Convention, a petitioner could commence an action after expiration of the one-year period. 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6–25, 1980, *Actes et Documents de la Quatorzième session: Child Abduction* (1982), at 169, Preliminary Draft, Article 15 (permitting return anytime "after the expiration of the time-limits set out in article 11"), *with* Article 18 (permitting return "at any time"). Thus, to the extent Preliminary Draft Article 11 was a statute of limitations, there is no basis to distinguish Article 12.

Petitioner is not relying on this history to imply that the United States delegation's characterizing Article 12 as a statute of limitations bound every nation to make equitable tolling available as to Article 12. Instead, the fact that the United States delegation, scholars, and the State Department described the Article 12 period as a statute of limitations shows that Petitioner's argument is not a post-hoc contrivance premised on the similarities to *Young*, 535 U.S. 43. Quite the opposite: The analysis and logic that underlie *Young* parallel the logic of the United States delegates, scholars, and State Department referring to Article 12 as a statute of limitations.[11]

Notably, neither Respondent nor the government points to any historic indicia that the period was seen *not* to be a statute of limitations. To the contrary, the facts are that, as part of the 2006 Special Commission meeting, the State Department highlighted to other Contracting States that United States courts and petitioners therein were using equitable tolling to address the concealment problem and explained that

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[11] The government's dismissive reference to this history as merely the views of "one delegation" also misses the point in another way. Insofar as the United States recognizes a rebuttable presumption that equitable tolling applies to a statute of limitations, it is the views of the United States as to whether it is a statute of limitations that are insightful. Statements by other nations would be devoid of significance with respect to whether the period would be subject to equitable tolling by virtue of United States common law. When the United States delegation said in 1980 that the period is a statute of limitations, and when the State Department concurred with that characterization in its submission to the 2006 Special Commission, it understood the significance of that term. Indeed, the State Department explained it therein. *See* Pet. App. 167a–69a.

the basis for doing so was *Young* and a domestic common law presumption that equitable tolling applies to all statutes of limitation. Pet. App. 167a–69a, 184a–85a. The State Department concurred with the premise that Article 12 is a statute of limitations and wrote that it "*supports* the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition." *Id.* at 169a (emphasis added).

As the government acknowledges, during the discussion of this issue in the Special Commission, *not a single Contracting State voiced objection or concern*. *Id.* at 185a.

C. Equitable Tolling Is Necessary To Deter and Prevent Future Child Abductions.

1. The Second Circuit found equitable tolling "unnecessary" because courts possess equitable discretion to decline to return a settled child at any time. Pet. App. 19a; a*ccord Yaman* v. *Yaman*, Nos. 13-1240, 13-1285, 2013 WL 4827587 (1st Cir. Sept. 11, 2013) (adopting Second Circuit holding and observation that availability of equitable discretion as alternative renders tolling "unnecessary"). The government endeavors to suggest the same in its brief here, arguing that an abducting parent will not "always" benefit from concealment because, in some instances, the concealing acts "may undermine" the abducting parent's claim that the child is settled or cause a child (of suitable age and maturity) to request return. Govt. Br. 31–32. Petitioner does not assume that equitable discretion will "always" result in non-return. Petitioner's point is that, absent equitable

tolling, concealment "probably will" result in non-return, Pet. Br. 54, especially under the government's standard for equitable discretion. *See infra* Part III.

Indeed, while the government posits scattered examples of when a court might, via equitable discretion, decide against return or forgo the settled analysis, Govt. Br. 24–25, plainly stated, the government's argument is this: "Equitable tolling is not necessary to deter concealment in the many cases like this one because, in cases *unlike this one*, the court might ultimately return the child."

The approach the government advocates leaves a gaping hole for the many cases like this one, where the abducting parent is effective in concealing the child's whereabouts but has refrained from committing actions that are "egregious" enough to undermine the claim that the child is settled. *See* Amicus Br. of NCMEC 26–28; Amicus Br. of A Child Is Missing, Inc. and Practitioners, et al. 16–17. In the context of a statute designed to deter and prevent abductions, *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1996 (2010), the government's approach would instruct abducting parents that, so long as they can conceal the abducted child for at least one year and refrain from egregious acts tending to undermine other exceptions to return, they probably will be able to defeat a petition for return. *See* Pet. Br. 54. This would not deter and prevent abduction; it would encourage abduction and concealment.

2. Respondent's intimations that reaching the "settled" question is sacrosanct and not returning a settled child is of preeminent importance after one year is undermined by several facts. If the delegations believed the settled question was of greater import than other considerations, they easily

could have, and would have, written the text of the Convention to prohibit return of any settled child and/or to require consideration of the settled exception whenever a child has been present for one year. But the Convention text permits return "at any time," Art. 18, even if a child has been, or might be, found settled. Moreover, the one-year period is measured at "filing" (as would be proper to motivate petitioners not to sleep on their rights) rather than the hearing date (which frequently occurs well beyond one year after removal even in cases not involving concealment), showing that Article 12 is not an emphatic mandate that, after one year, the primary purpose of the Convention shifts to requiring a court to reach the settled question and prevent return of any settled child. Rather, Article 12, is part of a balance of many interests, including those underlying Articles 18 and 34, and is merely the "least bad" approach, Explanatory Report ¶ 107, 458 (JA-364), for providing a means by which courts *might* account for settlement. Thus, the availability of equitable tolling for the purpose of obtaining return is not contrary to a sacrosanct or preeminent mandate of the Convention.

3. Far from "foreclosing" a court's exercise of equitable considerations with respect to return, Govt. Br. 29, equitable tolling would have courts apply familiar equitable criteria in a fashion that will be superior to achieving the goals of deterring future child abduction and concealment in the first instance. *See* Pet. Br. 21. The determination of whether equitable tolling applies in a particular case will depend on the reasoned application of its well-known elements to the facts by a court, including a determination of whether the left-behind parent was

duly diligent in searching for the child and pursuing relief.

Specifically, where a left-behind parent establishes that (1) he or she has been pursuing his or her rights diligently, and (2) the abducting parent has concealed the whereabouts of the child delaying the petitioner's timely filing, the court should not reach the settled question. *See* Pet. Br. 45–46, 53–54. And where equitable tolling is triggered and would bring the filing within the one-year period, before ordering return the court could still fully consider whether return would present not merely disruption but a grave risk to the child, as well as other exceptions under Articles 13 or 20, and, if so, refuse return.

Finally, in ordering the provisional remedy of return for a custody determination, the court will have available the full toolkit of measures—including undertakings, mirror-image orders and the like—to minimize disruption to the child. *See* 42 U.S.C. § 11604(a) (Pet. App. 122a); *see also NCMEC Training Manual, Litigating International Child Abduction Cases Under the Hague Convention*, 56 (2012). Such undertakings routinely include: provisions for the costs, timing and duration of return travel (often to minimize disruption and accommodate other needs and obligations of the child, the parties, and the foreign court); interim custody and visitation terms during the return period; and an agreement not to pursue criminal abduction charges against the abducting parent. *See, e.g.*, *Krefter* v. *Wills*, 623 F. Supp. 2d 125, 137 (D. Mass. 2009) (ordering that father pay return travel costs for child and abductor, secure suitable housing for them and pay child support, and that both parents "schedule court proceedings" in Germany to "require minimal

disruption" to child). *See also* Silberman, *Hague Turns Twenty*, 33 N.Y.U.J. INT'L. L. & POL. at 229–30 n.33; GARBOLINO, FEDERAL JUDICIAL CENTER GUIDE FOR JUDGES, *supra* 98–102, 108–09; Pet. App. 92a (noting that "Petitioner suggested several undertakings that could help ensure the child's safe [provisional return] to the United Kingdom" and observing "Petitioner made use of the United Kingdom's legal system to try to locate the child" and "there is no evidence that Petitioner would not comply with any court orders").

III. If the Court Finds Equitable Tolling Is Not Available, It Should Fashion a Standard for Equitable Discretion That Addresses Cases Like This, Not Merely the Outlier Examples Posited by the Government.

1. The government states that courts possess the discretion to forgo, or "pretermit," the settled analysis. While the government does not appear to propose a standard for lower courts to determine when to forgo the settled analysis (or for appellate courts to decide whether such discretion has been properly exercised), the government's example suggests a court may forgo that question only where, in addition to other things, the abducting parent's conduct was "egregious." Govt. Br. 25.

If the Court holds equitable tolling is unavailable, but agrees with the government that courts possess the discretion to forgo, or "pretermit," the settled analysis,[12] the Court should direct that lower courts

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[12] Respondent asserts that she and Petitioner agree that, "contrary to the position taken by the Government ... the Convention does not give courts discretion to skip entirely the now settled analysis." Resp. Br. 55 n.20. Respondent

forgo the settled analysis not only in the outlier or extreme cases where the abducting parent's concealment is so "egregious" as to undermine the settled exception itself or give rise to other grounds for return, but anytime (i) the abducting parent concealed the child (ii) resulting in a diligent petitioner's untimely filing.

Nothing in the discussions of concealment in the Convention text, drafting history, Explanatory Report, or the State Department's 1986 Legal Analysis for ICARA supports (or even alludes to) distinguishing between "concealment" and "egregious" concealment. Moreover, permitting the abducting parent to engage in concealment in order to secure the settled exception, so long as that concealment is not "egregious," would cede to abducting parents control over whether they can create, by virtue of their wrongful concealing conduct, grounds to defeat the petition. A rule of law that permits concealment so long as it is not egregious will not deter and prevent abduction and concealment. It will merely provide a playbook for executing them.

The Court's jurisprudence properly has recognized equitable relief from a deadline is appropriate

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misinterprets the Convention and misstates Petitioner's position. Petitioner's position is, and has been, this: If the Court finds that equitable tolling is available, it need not decide whether Articles 12 and/or 18 allow a trial court to forgo the settled question, Pet. Br. 42, because in cases where the elements for tolling are satisfied, a court by definition can "skip" the settled analysis. And, in the event the Court determines equitable tolling is not available, a court's exercise of equitable discretion should be as a threshold matter to determine "whether to address the 'settled' question." Pet. Br. 54; *accord* Govt. Br. 25 (providing examples where a court could "forgo" the settled question).

irrespective of whether the opposing party's actions were intentional, extreme, or extraordinary. *See* Pet. Br. 35 n.16; *Young*, 535 U.S. at 50. So too, if equitable tolling is unavailable, the Court's standard for dealing with concealment within the rubric of equitable discretion should turn not on the intent or degree of the concealment but on whether the child's whereabouts were concealed and whether the left-behind parent diligently pursued his or her rights.

2. Respondent argues that courts should consider concealment only "as part of a court's discretion to return ... after finding the child to be settled." Resp. Br. 32; *cf.* Govt. Br. 22, 24.

The Court should reject this approach for the reasons set forth in Parts I and II *supra*. Articles 18 and 34 make clear that Contracting States and Congress intended for petitioners and courts to have available the full toolkit of all laws, rules, and remedies to obtain return under the Convention. Respondent's approach forecloses courts from utilizing this toolkit.

Significantly, neither Respondent nor the government has articulated a workable standard for *how* concealment should be weighed or "taken into account in deciding whether to order return of a child ... found to be settled." U.S. Cert. Amicus Br. 18. The government suggests that a settled child might be returned when there has been "active" concealment, but this example suffers from the same flaws as the government's "egregious" example. Nor is it a workable standard to suggest, as the government does, *see* Govt. Br. 24, that courts weigh concealment with "any other relevant circumstances." *See* Pet. Br. 43–44.

Mandating that a court allow an abducting parent to raise the settled exception if she succeeds in concealing a child for one year rewards and encourages concealment. *See* Amicus Br. of NCMEC 29 ("Enticed by the potential availability of the settled defense, abducting parents would be encouraged to stretch out the search process ...."); Amicus Br. of A Child Is Missing, et al. 1 ("Absent a mechanism to preclude abducting parents from asserting the 'now settled' defense in cases of concealment ..., abducting parents will be incentivized to conceal the whereabouts of their children, and thereby allowed to frustrate the Hague Convention's fundamental aims."); Amicus Br. of IAML 5 ("Not only would the deterrent factor be vitiated," if the court cannot forgo the settled analysis, "it would in fact encourage parents who contemplate abduction to also conceal the child ....").

If the Court holds equitable tolling is unavailable, it should adopt a standard directing courts exercising equitable discretion to forgo the settled inquiry where the abducting parent's concealment of the child has delayed timely filing of the petition by a diligent left-behind parent.

CONCLUSION

The decision of the court of appeals should be reversed and the case remanded with instructions that equitable tolling is available as to the one-year time period in Article 12.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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AND
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IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner respectfully submits this brief to address issues raised by the United States in its brief recommending the Court grant certiorari.

As to the first question presented, the government's brief agrees with Petitioner that certiorari review should be granted. The Second Circuit's decision on equitable tolling conflicts with the decisions of three other courts of appeals on an issue of great importance, that conflict likely will be outcome-determinative in many cases, and this case is a suitable vehicle for resolving the question presented.

With respect to the substantive merits of the first question presented, the crux of the government's argument appears to be that equitable tolling is available only with respect to statutes of limitations and that the one-year period under Article 12 is not a statute of limitations. This Court's decision in *Young v. United States*, 535 U.S. 43, 43 (2002), dispels that fallacy. *See* Pet. 17–18. And, contrary to the government's assertion, the Ninth Circuit's holding that equitable tolling is available was not premised on a conclusion that the one-year period is a statute of limitations. *C.f.*, U.S. Br. 15; Pet. 16–17; Reply Br. 3–4. In fact, the Ninth Circuit acknowledges that the import of the one-year period "is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child.'" *In re B. Del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) (citations omitted). The Ninth Circuit therefore finds equitable tolling available because "[l]ogic and equity" dictate against "awarding an

abducting parent an affirmative defense if that parent hides the child from the parent seeking return." *Duarte v. Bardales*, 526 F.3d 563, 569–70 (9th Cir. 2008).

Unlike the equitable discretion advocated by the United States, only equitable tolling fulfills the drafters' primary objective to deter child abduction by "depriv[ing] [the abducting parent's] actions of any practical or juridical consequences." Perez-Vera Report, ¶ 16. The United States properly acknowledges that the "important animating principles of the Convention" are:

> [d]eterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent . . . .

U.S. Br. 11. Yet the "equitable discretion" approach advanced by the United States grants a paramount "tactical advantage" to every abducting parent who is able to conceal the child's whereabouts for more than twelve months: It provides an affirmative defense that otherwise would not be available and allows an abducting parent to defeat a petition for return of the child by showing merely that the child is "settled" in the United States.

As statistics and precedent show, this defense is far beyond the "narrow exception" it was intended to be. *See* 42 U.S.C. § 11604(a)(4). *See also* Hague Conference on Private International Law, "A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Prel. Doc. No. 3, Part II, pp. 495–96 (2007 Update) (observing that 33% of all judicially denied applications in 2003 were so denied based on the

settled defense, a 100% increase from 1999). An examination of more recent published decisions from 2012 and 2013 reveals only one occasion where a court that substantively addressed and adjudicated the settled issue concluded that an abducting parent failed to meet the burden of establishing the settled defense, even though many such cases include facts that weigh against such findings. *Bernal v. Gonzalez*, 2012 U.S. Dist. LEXIS 186693, at *51 (W.D Tex. Nov. 29, 2012) (finding children not settled); *compare, e.g.*, *Broca v. Giron*, 2013 U.S. Dist. LEXIS 31708, at *18–25 (E.D.N.Y. Mar. 6, 2013) (finding children settled although they had spent majority of their lives in Mexico, they had moved four times in two years since leaving Mexico and the abducting parent and children lacked legal immigration status).

Moreover, subsequent to the filing of the *amicus* brief of the United States in the Second Circuit below, which endorsed "equitable discretion" under Article 18 in place of equitable tolling, at least one court has concluded from a review of the drafting history of the Convention that Article 18 "equitable discretion" does not grant federal courts the authority to order the return of a child if that child is found to be settled. *See* Transcript of Proceedings for Bench Trial at 13–16, *Yaman v. Yaman*, No. 12-cv-221-PB, 2013 U.S. Dist. LEXIS 10960 (D.N.H. Jan. 28, 2013), ECF No. 165.

Finally, contrary to the government's assertion, equitable tolling does not require a court to order the return of a child "no matter how long the child ha[s] lived" in her new environment. U.S. Br. 10. The courts that make equitable tolling available require left-behind parents to show that they have made continuous, diligent efforts to locate the child, making

the scenario raised by the government unrealistic. *See, e.g., Van Driessche v. Ohio-Esezeobah*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) ("[I]n determining the application of equitable tolling, a petitioner's effort to seek the child's return are also considered."). It is thus unsurprising that the government points to no case giving plausibility to the circumstances it endeavors to conjure. Moreover, the government's example ignores that equitable tolling bars only the settled defense; other defenses relevant to such a scenario continue to remain available. For example, Article 13 provides that a court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *See, e.g., Matovski v. Matovski*, 2007 WL 2600862, at *14–15 (S.D.N.Y. Aug, 31, 2007) (taking into account views of 12- and 13-year-old children opposing return); *c.f., Blondin v. Dubois*, 238 F.3d 153, 166–67 (2d Cir. 2001) (concluding that "the District Court properly considered [the eight-year-old's] views" under Article 13 while expressing doubt that such testimony alone would be sufficient to establish a grave risk defense). Other defenses, such as the grave risk defense, also remain available and may prevent repatriation even if equitable tolling is available under Article 12. As such, equitable tolling plainly does not require return of the concealed child "no matter" other defenses.

Equitable tolling merely prevents abducting parents from gaining a "tactical advantage" from their affirmative wrongdoing by denying them the ability to raise an affirmative defense that otherwise would not be available: the ability to defeat the petition by making the modest showing that the child is settled.

The Court also should grant certiorari with respect to the second question presented because it is a question of great importance that recurs frequently. *See* Michael Singer, *Across the Border and Back Again: Immigration Status and the Article 12 "Well-Settled" Defense*, 81 FORDHAM L. REV. 3693, 3706 (2013) (surveying "the various approaches courts have taken in determining whether, and to what degree, immigration status should impact [the settled analysis]"); *id.* at 3728 (observing that "the issue . . . is not a theoretical procedural scenario or an arcane aspect of an obscure area of law, but a significant debate with far-reaching consequences" and concluding that "[t]he Supreme Court should grant certiorari to an Article 12 case to promulgate a bright-line rule . . . ."). *See also* Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 168–83 (2010) (detailing the different approaches courts have taken in considering immigration status).

That there is, as the government states, no pure split between the courts of appeals overlooks that courts are "frequently grappl[ing] with how immigration status . . . should impact the determination" of whether the child is settled and generally "have adopted one of three approaches to the issue . . . ." Singer, 81 FORDHAM L. REV. at 3693; *id.*at 3705–25 (surveying and categorizing the various cases and three approaches); *accord* Norris, 98 CAL. L. REV. at 175–183 (similarly digesting cases according to three distinct approaches). Even insofar as the two circuit courts have agreed that "the lack of lawful immigration status does not necessarily preclude a child from being settled," U.S. Br. 21,

those two opinions fail to resolve the specific, important, and recurring conflict that pervades courts as to the significance of an abducted child's lack of legal immigration status where there is no viable basis under existing law for seeking a change in that status. *C.f.*, U.S. Br. 28 (urging grant of certiorari with respect to the first question presented because, even if the Court were to decide equitable tolling does not apply, it "could offer guidance concerning how delay in commencing a proceeding might nonetheless be taken into account").

And the government's remaining arguments are not obstacles to the Court's proper consideration of this second question. For example, the United States argues that this case would not be an appropriate vehicle "because petitioner did not raise . . . in the court of appeals" that "respondent should have been required to submit 'evidence of a viable basis to change the child's status' before the child could be considered settled in the United States." U.S. Br. 21. But, because the "settled" question is an affirmative defense, the burden inherently falls on the proponent of the defense to present evidence to establish the defense.

Moreover, contrary to the argument of the United States that Petitioner failed to present these issues to the lower courts, no such waiver occurred. This second question—both generally and specifically with respect to the respondent's burden to produce affirmative evidence—was the subject of extensive briefing and oral argument before the court of appeals and district court. *See* Appellant Brief & Special Appendix at 54, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 37 ("Contrary to the District Court's conclusion, Appellee failed to

produce enough evidence in the aggregate to establish a well-settled finding in light of the child's and Appellee's illegal immigration statuses . . . ."); Appellant Reply Brief at 7 n.5, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Jan. 13, 2012), ECF No. 63 (distinguishing Respondent's immigration status from cases where abducting parents present evidence of ability to change lack of legal immigration status); Oral Argument Audio File Part 3 at 1:16, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Aug. 22, 2012) ("Our position is this: Where an abducting parent and child both lack legal immigration status, that status precludes a finding that the child is settled . . . for purposes of the Hague Convention unless the abducting [parent] can prove by a preponderance of the evidence the existence of a viable pending application or other legitimate basis to change that status.").[1] *See also* District Court Transcript at 21, Joint Appendix at A-641, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 41 (arguing that Respondent and child's immigration status precludes settled defense insofar as both are present illegally, cannot obtain employment, and Respondent failed to present evidence that viable grounds exist to change status in the future). That the Second Circuit elected not to squarely address this issue should be no obstacle to Petitioner and others obtaining clarity on this recurring and important issue.

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[1] The Second Circuit does not include an official oral argument transcript or audio recording on its docket, but makes such audio recordings available upon request. *See* Letter Requesting Oral Argument Audio Recording, *Lozano v. Alvarez*, No. 11-2224 (2d Cir.), ECF No. 106.

Similarly, insofar as the United States accepts and adopts the Second Circuit's statement that it declined to consider the long-term consequences of lacking lawful status because "petitioner[] fail[ed] to present the argument to the district court," U.S. Br. 20, respectfully, the record shows otherwise. Petitioner presented considerable evidence and argument as to "the long-term consequences of lacking lawful status." District Court Transcript, *supra*, at 21 (noting Respondent cannot become employed and noting the lack of evidence suggesting her status could change); Post-Hearing Mem. of Law in Support of Pet. at 19–20, Joint Appendix at A-564–65, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 40 (noting Respondent "cannot become employed due to her immigration status"). Indeed, in response to Petitioner's arguments, the district court explicitly acknowledged the *Koc* court's observation that the child's lack of lawful status would have the most profound of long-term consequences: it "would make it virtually impossible for the child to see her father if she remained in the country." Appx. 109a (citing *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001)). Petitioner unmistakably presented argument to the district court as to the long-term consequences of lacking lawful immigration status.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 100, provides that "[w]here a child has been wrongfully removed" from one Contracting State to another or wrongfully retained in a Contracting State and, at the date of the commencement of administrative or judicial proceedings, "a period of less than one year has elapsed" from the date of the wrongful removal or retention, the child shall be "return[ed]" "forthwith." The Convention further provides that "even where the proceedings have been commenced after the expiration of the period of one year," the court or administrative body "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

The question presented is whether equitable tolling applies to the one-year period provided in Article 12.

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In the Supreme Court of the United States

No. 12-820

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question presented in this case is whether the one-year period during which a country must return a child "forthwith" under the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (the Hague Convention or Convention), without any inquiry into whether the child is settled in her new environment, is subject to equitable tolling. As a party to the Convention, the United States has a substantial interest in the manner in which the Convention is interpreted and applied by the courts of this country. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of the case.

STATEMENT

1. The Hague Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010); see Hague Convention, 51 Fed. Reg. 10,498 (Mar. 26, 1986).[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and identifies remedies to be employed when a child is abducted from one country to another. See Convention Introductory Declarations, Art. 1.

Subject to certain defenses, if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located must "order the return of the child forthwith." Convention Art. 12.[2] When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new

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[1] The Convention is reprinted in 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State in connection with the Senate's consideration of the Convention, see *id.* at 10,494, 10,503-10,516.

[2] "Return is not required if the parent seeking it was not exercising custody rights at the time of removal or had consented to removal, if there is a 'grave risk' that return will result in harm, if the child is mature and objects to return, or if return would conflict with fundamental principles of freedom and human rights in the state from which return is requested." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021 (2013); see Convention Arts. 13, 20.

environment." *Ibid.* The Convention additionally establishes that the provisions concerning return of the child "do not limit the power of a judicial or administrative authority to order the return of the child at any time." Art. 18. "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 130 S. Ct. at 1995. The return remedy therefore is intended to "leave[] custodial decisions to the courts of the country of habitual residence." *Id.* at 1989.

To implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for seeking return of a child abducted to the United States. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021-1022 (2013). Under ICARA, a person who seeks a child's return from the United States may file a petition in state or federal court, and the court must "decide the case in accordance with the Convention." 42 U.S.C. 11603(a), (b) and (d). In passing ICARA, Congress made clear that "[t]he international abduction or wrongful retention of children is harmful to their well-being" and that "[p]ersons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention." 42 U.S.C. 11601(a)(1) and (2).

As required by Article 6 of the Convention, ICARA provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). The Office of Children's Issues in the Bureau of Consular Affairs in the Department of State has been designated as the Central Authority for the United States. See 22 C.F.R. 94.2. The Central Au-

thorities are to cooperate with one another to secure the prompt return of children, including by taking all appropriate measures to discover the whereabouts of abducted children. Convention Art. 7.

2. Petitioner and respondent are the parents of a child who was born in England in 2005. Pet. App. 4a-5a. In November 2008, respondent left petitioner and moved into a women's shelter in England with the child. *Id.* at 5a-6a. In July 2009, respondent and the child left the United Kingdom and eventually traveled to the United States. Since then, they have lived in New York with respondent's sister and her family. In New York, the child has been enrolled in school and as of 2011 was in kindergarten. The child has developed friendships, has grown close to respondent's sister and extended family, attends church, and takes ballet classes. The child has also been obtaining treatment for post-traumatic stress disorder and has improved substantially. *Id.* at 6a-7a.

After respondent's departure, petitioner unsuccessfully attempted to locate his child by contacting a sister of respondent's living in London (who denied any knowledge of respondent's or the child's whereabouts) and various police and government officials. Pet. App. 8a. In July 2009, petitioner initiated proceedings in England, seeking orders that would enable him to locate and contact the child. *Id.* at 8a, 58a. In March 2010, petitioner filed an application with the Central Authority for England and Wales, seeking the child's return. *Id.* at 8a. In that application, petitioner noted that respondent had threatened to take the child to the United States, where they could live with respondent's siblings. *Id.* at 59a & n.10. The applica-

tion was sent to the Central Authority for the United States. *Id.* at 8a, 59a & n.10.

3. a. In November 2010, 16 months after respondent removed the child from the United Kingdom, petitioner commenced this action, seeking to have the child returned to the United Kingdom pursuant to the Convention and ICARA. Pet. App. 8a-9a.

Respondent did not dispute that she had wrongfully removed the child from the United Kingdom within the meaning of the Convention. Pet. App. 78a-80a. She argued, however, that the court was not required to order the child's return under Article 12 because the return petition was filed more than one year after the child's abduction and "the child is now settled in [her] new environment." Art. 12; Pet. App. 81a, 92a-94a.

Petitioner contended that under a theory of equitable tolling, the court should extend the one-year period by seven months, the amount of time that petitioner alleged that he did not "kn[o]w that the child was probably in New York," and that his petition should therefore be treated as though it had been filed within a year of the child's removal from the United Kingdom. Pet. App. 102a; see *id.* at 95a. Applying that calculus, petitioner argued, the court would be obligated to order the child's return forthwith, without regard to whether the child is now settled in the United States. *Ibid.*

b. At an evidentiary hearing, the parties presented evidence concerning, among other things, the child's settlement in the United States and petitioner's claim that the one-year period under Article 12 should be extended by seven months under a theory of equitable tolling. Pet. App. 43a, 60a-64a, 95a, 102a-103a.

The district court denied petitioner's request for the child's return. Pet. App. 35a-36a, 37a-38a. The court issued a written opinion in August 2011. *Id.* at 39a-115a. The court held that "[t]he one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling." *Id.* at 99a. The court also observed that "even if equitable tolling could apply to Convention petitions," *id.* at 101a, an extension of the one-year period would not be warranted in this case because respondent "did not conceal the child to an extent that would warrant equitable tolling," *id.* at 103a.

The district court then concluded, based on evidence of the child's family, social, and educational ties to New York, that the child had become settled in her new environment. Pet. App. 104a-111a. The court stated that Article 12 did not bar it from ordering the return of a settled child, *id.* at 100a, but it concluded that ordering return in this case would be inappropriate in light of the child's strong connection to New York and the lack of any countervailing interest warranting return. *Id.* at 112a-114a.

4. The court of appeals affirmed. Pet. App. 1a-34a.

The court of appeals held that "the one-year period set out in Article 12 is not subject to equitable tolling." Pet. App. 17a. It explained that Article 12's one-year period is not a statute of limitations that bars the filing of a petition after the year has elapsed. Instead, expiration of the one-year period "merely permits courts to consider" whether the child is settled in her new environment in deciding whether to order return. *Id.* at 18a-19a. The court further explained that because Article 12 is designed to permit courts to "take

into account a child's interest in remaining in the country" if a petition is filed more than one year after the child's removal, extending the one-year period "would undermine its purpose." *Id.* at 24a.

The court found support for its conclusion in the text and drafting history of the Convention. Pet. App. 17a-24a. Noting that Article 12's one-year period runs "from the date of the wrongful removal or retention," the court observed that "if the state parties to the Convention wished to take account of the possibility that an abducting parent might" conceal a child's whereabouts, "[i]t would have been a simple matter" to do so—by having the one-year period run "from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts." *Id.* at 17a n.8 (brackets in original). The court further noted that "the drafting history demonstrates that this was a conscious choice, and that the drafters specifically rejected a proposal to have a different date trigger the start of the one-year period when the child's whereabouts had been concealed." *Ibid.*; see *id.* at 21a-23a (reviewing drafting history). The court also cited the position of the United States as amicus curiae, that the one-year period is not subject to equitable tolling, noting that the Executive Branch's interpretation of the Convention is entitled to "great weight." *Id.* at 24a-25a.

Finally, the court of appeals observed that equitable tolling was not necessary to ensure that abducting parents do not gain an advantage by concealing the child's whereabouts. Pet. App. 19a. The court explained that Article 12 permits a court to order return even if the child has become settled in her new environment, and that a court may take equitable consid-

erations into account in deciding whether to do so. *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

A. Article 12 of the Hague Convention requires the return of a child "forthwith" if a petition is filed less than one year after a child is wrongfully removed from or retained in another country. That one-year period is not subject to extension based on principles of equitable tolling. The plain text of Article 12 states that the one-year period runs from the date of the wrongful removal or retention, and it makes no provision for extension of that period. The choice of language is significant because the negotiators of the Convention understood that wrongful removal of children will often involve concealment of the child's whereabouts.

The Convention's drafting history demonstrates that the one-year period was a compromise adopted to balance the goal of returning a child forthwith and the prospect that, as time progresses, a child may form attachments to a new environment. The delegations that drafted and adopted this provision intended that the one-year time limit would apply regardless of difficulty in locating the child. Consistent with that determination, the courts of other States Parties that have considered the availability of equitable tolling to extend Article 12's one-year period have uniformly declined to adopt it.

B. The Department of State interprets Article 12 not to permit equitable tolling, but to confer on the court equitable discretion to consider concealment and other equitable factors in deciding whether a settled child should be returned in cases filed more than one year after wrongful removal. That interpretation is entitled to great weight.

Accordingly, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the return of the child. In conducting that equitable assessment, the court could conclude that the abducting parent's conduct in concealing the child (and any other equitable factors) justify returning the child to her country of habitual residence. Article 12 also affords the court discretion to pretermit the "settled" inquiry altogether if the court concludes that the circumstances supporting return are sufficiently forceful to justify ordering return regardless of the outcome of that inquiry. That approach could be appropriate, for example, if the abducting parent's conduct is egregious and scarcely more than a year has passed, if the child is very young, or if the child still has strong ties to her habitual residence.

C. Petitioner's arguments in support of equitable tolling appear to be based on the premise that Article 12's one-year period is a statute of limitations. It is not. Article 12 does not fix a time limit in which a parent may petition a court for the return of a child. Rather, it establishes the permissible substantive scope of a court's inquiry in adjudicating the return petition by permitting consideration of the child's interests—*i.e.*, whether the child is settled in her new environment—after one year has passed since the wrongful removal.

Adopting petitioner's equitable-tolling rule would rebalance the considerations weighed by the negotiators in drafting the Convention by requiring the court to return a child forthwith, regardless of the child's settlement in the new environment, so long as the petitioning parent could show that he had been pursu-

ing his rights diligently and was prevented by some extraordinary circumstance from filing a petition within one year of the child's removal or retention. Such a rule would be inconsistent with the approach adopted in the Convention to limit the period of mandatory return to one year so as to ensure that the child's potential settlement can be taken into account after that time.

Petitioner's further contention that equitable tolling should be applied as a policy matter, to avoid rewarding bad conduct by abducting parents, is unwarranted. Even where a statute of limitations is involved, the question whether equitable tolling applies is a question of statutory interpretation. Here, the compromise adopted in Article 12 is a clear indication that the language negotiated in the Convention was not intended to allow equitable tolling to apply, even in cases of concealment. Additionally, an abducting parent cannot always rely on concealment to resist return because some types of concealment may inhibit a child from forming attachments in a new environment, and concealment could also undermine other defenses the abducting parent could be expected to present, such as the child's objection to return. And because a court retains equitable discretion to order the return of a settled child, abducting parents cannot assume that they can defeat a return petition by concealing the child for a year.

ARGUMENT

THE ONE-YEAR PERIOD UNDER ARTICLE 12 OF THE HAGUE CONVENTION IS NOT SUBJECT TO EXTENSION BASED ON PRINCIPLES OF EQUITABLE TOLLING

A. Article 12 Provides For The Return Of A Child "Forthwith" Only If A Petition Is Filed Within One Year

A central purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State." Art. 1; see Introductory Declarations. To accomplish that purpose, the Convention provides that children abducted in violation of a parent's rights of custody should be promptly returned to their country of habitual residence. See Arts. 1, 12. Article 12 requires that a court order the return of a child "forthwith," except in limited circumstances provided in other Articles (see note 2, *supra*), if a petition is filed within one year of the wrongful removal or retention of the child. The Convention also provides, however, that if more than one year has elapsed, the court may consider whether the child is "now settled" in her new environment. Art. 12. That one-year period is not subject to equitable tolling.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1990 (2010) (citation omitted). The plain language of Article 12 indicates that the one-year period is not subject to extension. Article 12 provides that if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the

date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located "shall order the return of the child forthwith." Convention Art. 12. When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment." *Ibid.*

The one-year period thus runs "from the date of the wrongful removal or retention," and Article 12 makes no provision for an extension of that period. Convention Art. 12. As the court of appeals observed, if the States Parties to the Convention had meant to vary the starting date of the one-year period based on the circumstances of a left-behind parent's locating his or her child, they easily could have adopted a discovery rule—providing for a one-year period running from the date the petitioning parent learned or reasonably could have learned of the child's whereabouts. Pet. App. 17a n.8.

The choice of language is significant because the Convention negotiators fully understood that wrongful removal of a child to a foreign country commonly results in difficulties, often due to concealment, in learning the child's whereabouts. See Elisa Pérez-Vera, *Explanatory Report* in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction* 426, paras. 107-108, at 458-459 (Permanent Bureau trans., 1982) (*Actes et Documents*) (acknowledging "difficulties encountered in establishing the child's whereabouts," but stating that the "single time-limit of one year" was the optimal resolution of

competing concerns);[3] see also, *e.g.*, *Replies of the Governments to the Questionnaire* in *Actes et Documents* 61, 88 ("There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree."); *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 215, 231-232 (noting that in many cases, a child's location is unknown at the time of abduction and that some abductors will conceal the child's whereabouts). Given that understanding, one would expect Article 12's text to provide for the running of the one-year period from the date the left-behind parent knew or should have known of the child's whereabouts, or to address tolling in circumstances involving concealment, had the Convention's drafters intended either result.

2. The Convention's drafting history demonstrates that the decision to calculate Article 12's one-year period from the time of a child's removal or retention, rather than from the discovery of the child's whereabouts, was a considered choice made during Convention negotiations. See *Air France* v. *Saks*, 470 U.S. 392, 396, 400 (1985) (noting that because multilateral treaties are negotiated by numerous delegates, "the history of the treaty, [and] the negotiations," may be especially important, and therefore "[i]n interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation").

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[3] The State Department has described the *Explanatory Report* "as the official history and commentary on the Convention." 51 Fed. Reg. at 10,503. This Court has not decided how much weight the *Explanatory Report* should be accorded. *Abbott*, 130 S. Ct. at 1995.

At the outset of the process of drafting the Convention, a preliminary report prepared for a Special Commission charged by the Hague Conference on Private International Law with studying the problem of international parental kidnapping emphasized that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation." Adair Dyer, *Report on International Child Abduction by One Parent* in *Actes et Documents* 12, 23-24. Thus, the Special Commission initially suggested that if "an application has been made more than six months after the removal" and the child has been "habitually resident" in the new country for more than one year, a court in the new country should "assume jurisdiction to determine" the proper custody arrangement rather than simply return the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping* in *Actes et Documents* 162, 164.

Consistent with that view, the preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 166, 168 (Art. 11). But when the child's location "was unknown," the six months would "run from the date of the discovery," although even then the "total period" could not exceed one year. *Ibid.*

During consideration of that draft, the delegations from the participating nations debated the workability

of a two-tier system and the proper length of each time period. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216, 218, 242; *Procès-verbal No. 6* in *Actes et Documents* 283, 288; see also *Procès-verbal No 7* in *Actes et Documents* 290, 291-293. Several delegations expressed concern that abductors would conceal the whereabouts of their children. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216. Nevertheless, after a number of delegations expressed the view that determining the "date of 'discovery'" would be difficult, the delegations decided to adopt a single time period that did not vary based on discovery. See *Procès-verbal No 7* in *Actes et Documents* 291-293; *Explanatory Report* para. 108, at 458-459.

During discussion of the appropriate length of that single time period, the United States delegation urged that the period should be long enough to account for the difficulty of locating a child but should also take into account the possibility of the child's assimilation into a new environment after enough time had passed. *Procès-verbal No 7* in *Actes et Documents* 292. Several other delegations expressed concern that a long period of virtually automatic return would fail to consider the child's potentially strong ties with the new environment. *Id.* at 292. The delegations ultimately settled on the one-year period of essentially automatic return ultimately embodied in Article 12. *Id.* at 293. To balance the relevant concerns, the German delegation suggested that even after the "short time-limit of one year" had expired, a State should still be required to return the child unless "the child was now settled in his new environment." *Id.* at 295; see also *Working*

Document No. 25 in *Actes et Documents* 274 (initial proposal). The delegations debated, modified, and ultimately adopted this proposal. See *Procès-verbal No 10* in *Actes et Documents* 314-316 (modification and debate). Under the resulting framework, as described by the United States delegation, the Convention provides for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, *e.g.*, severe risk to the child. *Id.* at 315; see note 2, *supra*. After one year, "assimilation in a new environment [becomes] an open question." *Procès-verbal No 10* in *Actes et Documents* 315.

The one-year period during which return is required, without further inquiry thus represented a compromise between the interest in securing the immediate return of a wrongfully removed child and the interests that may arise when a child develops attachments to a new environment. From the outset, the delegations negotiating the Convention contemplated that after *some* fixed period of time, return would not be mandatory. See *Preliminary Draft Convention* in *Actes et Documents* 168 (Art. 11) (time period running from "date of the discovery" but "total period" could not exceed one year). The negotiators explicitly considered but ultimately rejected a two-tier framework in which the period for obligatory return would be extended if there were difficulty locating the child. See *Procès-verbal No 7* in *Actes et Documents* 291-293. When the negotiators adopted the single time limit, they plainly understood that the time limit would apply regardless of difficulty in locating the child. See, *e.g.*, *id.* at 292-293, 295.

3. The post-ratification understanding of States Parties to the Convention reinforces the conclusion that the one-year period is not subject to equitable tolling. See *Abbott*, 130 S. Ct. at 1993 ("In interpreting any treaty, [t]he opinions of our sister signatories * * * are entitled to considerable weight.") (internal quotation marks omitted; brackets in original); 42 U.S.C. 11601(b)(3)(B) ("recogniz[ing]" "the need for uniform international interpretation of the Convention").

To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling to extend Article 12's one-year period of automatic return have uniformly declined to adopt it. In *Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.), the Court of Appeal for England and Wales stated that even where the "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." *Id.* at 48. The court explained that "disregard[ing]" the "period gained by concealment" would be "too crude an approach which risks * * * produc[ing] results that offend what is still the pursuit of a realistic Convention outcome." *Id.* at 48-49. Courts in Canada, Hong Kong, and New Zealand have likewise not tolled Article 12's one-year period. *Kubera* v. *Kubera*, 2010 BCCA 118, para. 64 (Can.); *A.C.* v. *P.C.*, HCMP001238/2004, 2005 WL 836263 paras. 51-55 (C.F.I.) (Legal Reference System) (H.K.); see also *Secretary for Justice* v. *H.J.*, [2006] NZSC 97, paras. 21-24, 69 (SC) (N.Z.).

The only case that petitioner even attempts to fit into the box of equitable tolling (Pet. Br. 47-48) is *In re H* [2000] EWHC (Fam) 2 FLR 51, [2000] 3 FCR 404

(Eng.), http://www/hcch.net/incadat/fullcase/0476.htm, in which a single-judge family court concluded that the reason for delay in locating the child was "relevant to the question of settlement." *Ibid.* The court explained that "[s]ettlement * * * is to be given its ordinary meaning with two constituents, physical and emotional," and ultimately held that "in the circumstances of th[e] case," the abducting parent could not establish that the child was settled. *Ibid.* Although the court's reasoning is not entirely clear, it appears that the court was balancing the child's physical and emotional attachments to a new environment with the equities of the parents—a framework that is functionally similar to the rule of equitable discretion advocated by the United States. See Part B, *infra*. The court did not refer to a rule of equitable tolling. In any event, the Court of Appeal for England and Wales, in rejecting equitable tolling as "too crude an approach," was fully aware of that case. See *Cannon*, 1 W.L.R. at 40 (para. 25) (reviewing the *In re H* decision).

Article 12 thus reflects a compromise based on the judgment that once enough time elapses, the return of a child may not be appropriate. The Convention implements that judgment with a single one-year period during which the child must be returned "forthwith"; after that period, the court may consider whether the child is settled before ordering return. The text, drafting history, and decisions of other States Parties demonstrate that the one-year period may not be extended.

B. The Department Of State Interprets Article 12 Not To Permit Equitable Tolling, But To Allow A Court To Consider The Abducting Parent's Concealment In Exercising Its Equitable Discretion To Order The Child's Return

1. The Department of State—which negotiated the Convention and facilitates the return of children from and to other countries, and whose Office of Children's Issues serves as the Central Authority for the United States—interprets Article 12 not to permit equitable tolling. But it interprets the Convention to confer on the court equitable discretion, in cases filed more than a year after wrongful removal or retention, to consider concealment and other equitable factors in determining whether the child should be returned.[4]

The State Department's interpretation is informed, in part, by its recognition that foreign courts hearing petitions seeking the return of a child to the United States should not be precluded from considering relevant factors, including the behavior of the abducting parent, in determining whether to order the return of the child. The State Department's interpretation is

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[4] In its 1986 analysis of the Convention in connection with the Senate's consideration of ratification, the State Department stated that a court is not obligated to return a child who has become settled in her new environment; that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition"; and that "[i]f the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of the return proceeding by the applicant, it is highly questionable whether the [abducting parent] should be permitted to benefit from such conduct absent strong countervailing considerations." 51 Fed. Reg. at 10,509.

"entitled to great weight." *Abbott*, 130 S. Ct. at 1993 (citation omitted).[5]

2. Although Article 12 is not subject to equitable tolling, the Convention "provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct— * * * discretion to order the return of a child, even when a defense is satisfied." Pet. App. 27a; see *id.* at 19a (even when a child is settled, a court may order the child's return).

Article 12 provides that "where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return

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[5] In response to a 2006 questionnaire from the Hague Conference on Private International Law, the State Department noted that statutes of limitations are often assumed to permit equitable tolling and reported five decisions in which American courts had tolled Article 12's one-year period. Hague Conference on Private Int'l Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 217, 430 (Oct. 2006). The State Department described this as "a positive trend" that prevents abducting parents from being "rewarded for evading identification" and left-behind parents from being "penalized for the other parent's successful concealment," *id.* at 430, and stated that it "supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child," *id.* at 577. The State Department thus endorsed the concept of "equitable tolling," as it had been applied in the lower-court decisions, as a means of enabling courts to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions. Upon broader examination of the issues in connection with its participation in this case as amicus curiae in the court of appeals, the Department concluded that "equitable discretion," and not "equitable tolling," is the appropriate legal framework for consideration by courts of concealment and other factors bearing on return.

of the child, unless it is demonstrated that the child is now settled in [her] new environment." Article 12 thus *requires* return of the child if less than one year has elapsed or if the child is not settled in her new environment.

But even when a year has passed and the child is now settled in her new environment, the Convention does not affirmatively *prohibit* return. See, *e.g.*, *Oregon* v. *Ice*, 555 U.S. 160, 165 (2009) (explaining that state statute providing that sentences shall run concurrently, unless the court finds certain facts, permits (but does not require) the judge to impose consecutive sentences if it finds such facts); *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 388-389 (5th Cir. 2001) (similar); cf. *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316, 339 (1999) (stating that the interpretation of the similar "except/shall" statutory structure "depends primarily on the broader context in which that structure appears"). Rather, against the background presumption favoring return, see Convention Art. 1; *Abbott*, 130 S. Ct. at 1997, Article 12 permits (but does not require) the return of a child who is settled if the court determines that equity warrants return. See *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) ("[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it.'") (quoting *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 163 (1940)); *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) (when "a general statement of policy" (like that in Article 1 of "secur[ing] the prompt return of children") "is qualified by an exception," courts "usually read the exception narrowly"); 42 U.S.C. 11601(a)(4) (describing the exceptions to return as "narrow").

As multiple courts of appeals have concluded, a court thus retains equitable discretion to order the return of a child even though she is settled in her new environment. See *Yaman* v. *Yaman*, Nos. 13-1240, 13-1285, 2013 WL 4827587, at *12-*17 (1st Cir. Sept. 11, 2013) (recognizing discretionary authority to return "now settled" child); *Blondin* v. *Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (same); cf. *Asvesta* v. *Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any Convention exception to return); *Miller* v. *Miller*, 240 F.3d 392, 402 (4th Cir. 2001) (same); *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (same); *Feder* v. *Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (same).

The British House of Lords and courts of other States Parties have similarly held that they possess equitable discretion to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the "settled" analysis. See *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288, 1296-1297, 1304 (appeal taken from England) (stating that Article 12 "envisage[s] that a settled child might nevertheless be returned" and that the Convention "leaves the court with all options open," including taking into consideration that "the late application may be the result of active concealment"); *Cannon*, 1 W.L.R. at 43-46, 49-50 ("Even if settlement is established on the facts the court retains a residual discretion to order a return under the Convention."); *Kubera*, 2010 BCCA 118, paras. 102-104 ("settled" inquiries should take into account "both the objectives of the Convention and the interests of the child in the particular factual

circumstances"); *A.* v. *M.*, 2002 NSCA 127, paras. 74-82 (N.S.) (considering concealment and deterrent purpose of Convention in conducting "settled" analysis); *P.* v. *B.* (No. 2), [1999] 4 I.R. 185 (Ir.) (considering bad conduct by abducting parent in evaluating whether to return a settled child); *H.J.*, [2006] NZSC 97, para. 69 (concluding that "the policy implications of not letting a parent gain an advantage from concealment or deceit" should be addressed "as a facet of the exercise of the discretion"); cf. *Director-General, Dep't of Cmty. Servs.* v. *M & C,* (1998) 24 Fam LR 178, paras. 95-98 (Family Ct.) (Austl.) (reserving question of discretion to order return under Convention and its implementing regulations).[6]

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[6] On this point, the *Explanatory Report* states that once a child has become settled, her "return should take place only after an examination of the merits of the custody rights exercised over [her]—something which is outside the scope of the Convention." *Explanatory Report* in *Actes et Documents* para. 107, at 458. This language echoes an earlier report by the same author on the preliminary draft. See Elisa Pérez-Vera, *Report of the Special Commission* in *Actes et Documents* 172, para. 89, at 201 ("In fact, if the return is looked at from the point of view of the child's interests, when the child is well integrated in his new social environment, his return should not take place before the custody rights have been examined on the merits—which would fall outside the object of the Convention, which seek[s] to ensure an immediate return without prejudging the custody on the merits."). It is not clear whether this language is the author's interpretation of Article 12 or a policy recommendation that once a child is settled, it would be better to conduct a full custody determination in the country where the child is now settled. In any event, as the First Circuit has explained, a court's exercise of discretion concerning whether to order a child returned to another country is not "a determination of custody." *Yaman*, 2013 WL 4827587, at *19. The decision to return has no bearing on any past or future custody decision made under the family law of either country. *Ibid.*; Convention Art. 19.

In conducting that equitable assessment, the court should take into account the Convention's background presumption favoring return. Cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-499 (2001). The court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts, and other equitable factors, justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report* in *Actes et Documents* paras. 15-16, at 429. The court may therefore consider the abducting parent's misconduct (including whether the parent actively took steps to conceal the child), together with any other relevant circumstances such as the degree to which the child is settled, whether return would not be harmful or disruptive even if the child has become settled, the extent of the left-behind parent's custody rights, and any other reasons for the lapse of time in filing the petition.

Furthermore, given that the child's settlement can be outweighed by other equitable factors, Article 12 should be understood to afford the court discretion in appropriate cases to pretermit an extensive "settled" inquiry—which can involve a fact-intensive and time-consuming inquiry into the child's living situation—if it is apparent to the court at the outset that equitable factors favoring return would clearly outweigh the outcome of any "settled" analysis. Cf. *Chisom* v. *Roemer*, 853 F.2d 1186, 1188 (5th Cir. 1988) (because alleged harm to party seeking a preliminary injunction was not irreparable and the public interest did

not require an injunction, court "pretermit[ted] a discussion" of the first two preliminary injunction factors).

Although Article 12 does not explicitly state that a court may forgo deciding whether a child is "now settled" (see Pet. Br. 41-42; Resp. Br. 55 n.20), that is simply the logical implication of the fact that even if a child is "now settled," a court may still order the child's return. Such discretion is reinforced by Article 18, which provides that "[t]he provisions of this chapter [enumerating exceptions] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention Art. 18 (emphasis added). A court could conclude in a particular case, for example, that fact-intensive discovery and hearings delving into the child's life would serve little purpose where the abducting parent's conduct was egregious, and—based perhaps on scarcely more than a year having passed, or on a child's young age or her continued strong ties to the habitual residence—that whether the child was now settled would be, at most, a close question that could not outweigh other factors. See *Chafin*, 133 S. Ct. at 1027 ("[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."); *id.* at 1028 (litigation "uncertainty adds to the challenges confronting both parents and child"); cf. Convention Art. 1 (one object of the Convention is "[t]o secure the prompt return of children").

C. Petitioner Identifies No Authority For Extending Article 12's One-Year Period During Which A Child Must Be Returned "Forthwith"

1. Petitioner's arguments in support of equitable tolling appear to rest on the premise that Article 12 is a statute of limitations (Br. 23-29), and that it may therefore be tolled under general principles of domestic law of the United States. There is no indication that the Convention negotiators intended the one-year period they adopted to be applied against the backdrop of one State's domestic tolling principles—or the disparate domestic tolling principles of each State. But in any event, Article 12's one-year period is not a statute of limitations; it is a period that triggers a substantive defense. Accordingly, even if ordinary presumptions for interpreting domestic law were applicable to the Convention, see *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (describing "rebuttable presumption" that equitable tolling applies for "federal statute[s] of limitations"), there is no basis for presuming that the one-year period contained in Article 12 is subject to equitable tolling. See *Hallstrom* v. *Tillamoook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period).

A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all. The limitations period reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young* v. *United States*, 535 U.S. 43, 47

(2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable—*i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the limitations period. See *Lawrence* v. *Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Article 12's one-year period is not a statute of limitations. It does not fix a time limit in which a parent may petition for the return of a child. Instead, the one-year period establishes the permissible substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to "order the return of the child forthwith" if it finds that the child was wrongfully removed (and no other exception to return applies). After one year, the court may also consider the child's ties to her new environment in deciding whether to order return. The expiration of the one-year period does not extinguish the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return. To the contrary, the court must still order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled.

Article 12's one-year period is thus not comparable, as petitioner suggests (Br. 28-29), to the "three year lookback" period in the Bankruptcy Code that the Court concluded was a statute of limitations in *Young*. 535 U.S. at 47. Under that provision, if the Internal Revenue Service "has a claim for taxes for which the

return was due within three years before the bankruptcy petition was filed, the claim enjoys eighth priority under [11 U.S.C.] 507(a)(8)(A)(i) and is nondischargeable in bankruptcy under [11 U.S.C.] 523(a)(1)(A)." *Young*, 535 U.S. at 46. The court explained that this three-year lookback period is a statute of limitations because it "prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced," and thus encourages the IRS to perfect its right to the tax revenue within three years so that its claim will not lose priority and become dischargeable. *Id.* at 47. The Court explained that the lookback period "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Id.* at 47 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000) (brackets in original)).

Unlike the lookback period in *Young*, Article 12 does not simply balance the parties' (the parents') respective interests in redress and repose and provide a time limitation for claims based on a balance of those interests. Article 12 allows a left-behind parent to file a claim at any time, but it permits the court to take into account specific interests of the child—*i.e.*, whether she is settled in her new environment—not merely the parents' interests in redress and repose, after one year. One year represents the point at which the delegations negotiating the Convention determined that the child has been in the new environment long enough that the court, in deciding on the merits whether to order return, should be authorized

to consider whether she is now settled in that environment.

Petitioner, in essence, asks the Court to restrike the balance of considerations the negotiators of the Convention struck in drafting Article 12. But recognizing equitable tolling of Article 12's one-year period would disrupt the framework adopted in the Convention. Under petitioner's view, in cases where (1) the left-behind parent has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in the way of his filing a timely petition, the petition would be treated as having been filed within one year. See Pet. Br. 45-46, 53 (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). The court would then be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there, how strong her attachments had become, or how few attachments she had left in her country of habitual residence. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reason for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the child's mandatory return. *Explanatory Report* in *Actes et Documents* para. 107, at 458.

Petitioner observes (Br. 6, 27-28, 38) that the United States delegation used the term "statute of limitations" when suggesting changes to the preliminary draft of the Convention. The delegation was commenting on a different version of Article 12, and one that explicitly provided for extension of the filing period when the whereabouts of the child were un-

known. See *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 168 (Art. 11). In any event, one delegation's passing use of the term "statute of limitations" during a negotiation session does not transform an explicit and firm time period in a multinational Convention into a flexible period presumed subject to equitable tolling based on background principles applied by the courts of one nation (the United States).

2. Petitioner for the first time asserts (Br. 23-26, 30) that Article 34 of the Convention invites countries to engraft a rule of equitable tolling onto Article 12's one-year period. Article 34 provides that the Convention "shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained." Art. 34. That provision allows for the use of international agreements or domestic law to effectuate the return of a child. See *Explanatory Report* in *Actes et Documents* paras. 39-40, 143, at 436-437, 470. Petitioner's reliance on Article 34 thus would allow a principle concerning equitable tolling in domestic law to trump the express provision in Article 12 itself for consideration of a child's "settled" status after one year. To do so would disrupt the balance of interests struck in Article 12.

3. Petitioner further contends (Br. 34-36, 53) that equitable tolling should be applied as a policy matter, so that parents will not have an incentive to conceal an abducted child for a year to avoid Article 12's period

of automatic return. That argument is both legally and factually incorrect.

Even in a case involving a statute of limitations in an Act of Congress (which Article 12 is not), the question whether equitable tolling is available is a question of statutory interpretation. There is only a "rebuttable presumption" that tolling applies, which can be overcome by a showing that Congress intended to the contrary. See *Holland*, 130 S. Ct. at 2560-2561; *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008); *United States* v. *Brockamp*, 519 U.S. 347, 350-354 (1997); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Here, the negotiators of the Convention took account of the concealment concern petitioner identifies, but they also understood the potential harm of an automatic-return requirement for children who may have formed significant attachments in a new environment. The Convention reflects a judgment that the proper balance of those interests is to enable the court to consider the child's attachments in cases where it has been more than a year since the wrongful removal or retention. Petitioner's policy arguments are therefore already accounted for in the balance struck in the Convention. Any presumption in favor of equitable tolling is overcome by the negotiators' rejection of a discovery rule and adoption of the one-year period instead.

Furthermore, petitioner is wrong to assume that abducting parents can always rely on the prediction that by concealing the child, they can defeat a petition for the child's return. Concealment may undermine a child's ability to form stable attachments in a new environment. Concealment may also call into doubt other evidence and defenses that the abducting parent

can be expected to present, such as the child's objection to return, a defense found in Article 13. See *Wasniewski* v. *Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 15, 2007) (refusing to give weight to child's opinion when his "generalized statements" suggested that "his mother's influence * * * biased [the child's] opinion of Poland, particularly given [her] efforts to isolate [the child] from his father and his earlier childhood"); *Gonzalez* v. *Nazor Lurashi*, No. 04-cv-1276, 2004 WL 1202729, at *5 (D.P.R. May 20, 2004) (refusing to treat child's opinion as conclusive because the "child has not seen [his mother] nor his sister in over 16 months even though they occasionally communicate by telephone, e-mail and letters. Thus, we understand the child has been heavily influenced by [his father's] wish for the child to remain in Puerto Rico").

More fundamentally, as discussed in Part B, *supra*, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the child's return and may take the abducting parent's conduct into account in deciding whether to order return despite the passage of one year since the wrongful removal. Abducting parents therefore cannot rely on the prediction that by concealing the child, they can defeat a petition for the child's return. The inequity of rewarding an abducting parent's misconduct is appropriately addressed at that later stage, but it does not warrant an extension of the one-year period of automatic return adopted in the Convention so as to bar any consideration at all of whether the child has become settled in her new environment.

4. Finally, although petitioner agrees (Br. 40) that a court has discretion to order a child's return even if

the child is now settled in a new environment, petitioner contends (Br. 45) that the Court should nevertheless recognize equitable tolling because, according to petitioner, few courts have exercised that discretion to order a child's return after the one-year period has expired. That concern is unfounded.

As petitioner has described, a number of United States courts have addressed concealment by tolling Article 12's one-year period of mandatory return, as petitioner urges this Court to do. Pet. Br. 45, Pet. 13-19 (cataloguing cases). Had those courts instead correctly recognized that Article 12's one-year period is not a statute of limitations subject to equitable tolling, it is entirely speculative for petitioner to assume that that those courts would have concluded the children involved were settled and that the full range of equitable factors would not have warranted their return in any event.

The one-year period of mandatory return was a compromise adopted to balance the interests of returning a child forthwith and the prospect that as time progresses, a child may form attachments to a new environment. Petitioner has identified no authority for extending that period through a principle of equitable tolling, and doing so would be inconsistent with the framework agreed to in the Convention.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF A CHILD IS MISSING, INC., AND PRACTITIONERS AND SPECIALISTS IN HAGUE CONVENTION CHILD ABDUCTION LITIGATION AND THE FIELD OF CHILDREN AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are a non-profit organization dedicated to the recovery of missing children, a distinguished legal scholar whose academic focus is the exploitation of women and children, and leading practitioners and specialists with extensive experience representing parents in child abduction cases brought under the Hague Convention on the Civil Aspects of International Child Abduction. Collectively, *Amici Curiae* practitioners have litigated or been involved in more than 800 child abduction cases under the Hague Convention.

Based on *Amici Curiae*'s experience and expertise, they believe that the one-year period in Article 12 of the Hague Convention must be subject to equitable tolling when an abducting parent conceals the whereabouts of the child or engages in other misconduct that prevents the left-behind parent from locating the child and filing a petition for the child's return within one year of the child's abduction. Absent a mechanism to preclude abducting parents from asserting the "now settled" defense in cases of concealment through the application of equitable tolling principles, abducting parents will be incentivized to conceal the whereabouts of their children, and thereby allowed to frustrate the Hague Convention's fundamental aims, which are to deter child abductions and promptly return kidnapped children to their country of habitual residence for a determination of parental custody. For these reasons, *Amici Curiae*

respectfully submit this Brief in support of Petitioner.[1]

A Child Is Missing is a Florida-based non-profit organization devoted to assisting law enforcement authorities in the search for and recovery of missing children. Sherry Friedlander founded A Child is Missing in 1997. Ms. Friedlander has been a participant in The White House Conference on Missing & Exploited Children, and often speaks publicly regarding efforts to recover missing children. Ms. Friedlander and her organization train law enforcement agencies and police/Sheriff departments in the search for missing children (Autistic/Down Syndrome), the elderly (often with Alzheimer's disease), and the disabled in all 50 states. To support its efforts, A Child Is Missing is a member of the Association of Missing and Exploited Children, Broward Chiefs Association, the Broward Coalition for Human Trafficking, UN-NGO member, and other groups. Ms. Friedlander maintains strategic alliances and sponsorships with companies such as Bank of America, as well as the State of Florida, Florida Department of Law Enforcement, the Georgia Bureau of Investigation and other state bureaus. A Child is Missing is

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[1] A letter of consent by Respondent to the filing of this brief accompanies this brief. Petitioner has consented to the filing of *amicus* briefs and has filed a letter reflecting his blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

available to assist all of the approximately 18,000 law enforcement departments in the United States free of charge, 24 hours a day, 365 days a year.

Robert D. Arenstein, a family law practitioner for nearly 40 years, has been involved in more than 350 cases brought under the Convention, including many of the most prominent. He was a participant, speaker and/or Delegate to the Hague Convention Meetings on Implementation of The Hague Convention on Civil Aspects of International Child Abduction in the Netherlands in 1993, 1996, 1999, 2003, and 2007, and a member of the United States' delegation to the Hague in 1996. Mr. Arenstein has held numerous positions of leadership in the field of international child abduction litigation. Among other leadership positions, he has acted as chair of the Federal Kidnapping Committee of the Academy of Matrimonial Lawyers, liaison to ABA Parental Abduction Project, and Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Department of Justice in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children (NCMEC). He has presented a program entitled How to Try a Hague Convention Case, including to the International Academy of Matrimonial Lawyers in 2008, and is the author of several scholarly articles on the Hague Convention.

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Alycia N. Broz, is a Partner in the national law firm Vorys, Sater, Seymour and Pease LLP. Ms. Broz has a broad litigation practice in federal and state courts, and *pro bono* experience litigating children's rights and child abduction issues under the Hague Convention, including substantial involvement with the question before the Court. Ms. Broz received her J.D. from Northwestern University School of Law and was a Note and Comment Editor for the Northwestern University Law Review. She received her B.S. *magna cum laude* from Marquette University. She began her career as a law clerk for The Honorable Algenon L. Marb-

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Linda Shay Gardner is Principal with the Gardner Law Office. A leading practitioner in the field, she has worked on or been consulted regarding approximately 200 cases involving child abduction and the Hague Convention. She has testified as an expert witness in cases involving international child custody disputes, and consults with the U.S. State Department's Office of Children's Issues regarding Hague Convention cases, and is an advisor to NCMEC. She is recognized by the American Bar Association's ICAAN project to provide referrals in abduction cases, and often represents clients in interstate custody disputes, usually involving the Uniform Child Custody Jurisdiction and Enforcement Act.

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Rana Holz is a Partner in the law firm Rubinstein & Holz, P.A. She is board certified in marital and family law, which she has practiced exclusively for 22 years. Ms. Holz received an Award of Merit

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Omonzusi Imobioh is Principal with the Law Offices of Omonzusi Imobioh. Ms. Imobioh focuses her practice primarily in the areas of Family Law, Family-Based Immigration, and Probate. She maintains an active *pro bono* practice, representing *pro bono* clients through the Houston Volunteer Lawyer's Program, YMCA International, and Lone Star Legal Aid of Texas. She has represented a parent in a Hague Convention child abduction case involving the legal question presented in this case.

Lawrence S. Katz, Principal in the law office of Lawrence S. Katz, P.A., has been counsel of record, mentored or consulted in over 250 Hague Convention and child abduction cases. Mr. Katz is a Fellow in the International Academy of Matrimonial Lawyers, a Member of its Board of Directors, and Chair of its Committee on the Hague Conventions. He is also past Chairman of the ABA Family Law Section's Committee on International Law. Mr. Katz is a mentor with ICAAN, the U.S. Department of State Attorney Network, and the ABA International Child Abduction Attorney Network. He has extensive experience litigating under the Hague Convention. He was the first U.S. attorney to

recover children from: Turkey (non-Hague), Iran, Saudi Arabia, Japan, Haiti, the Bahamas, and Russia. Mr. Katz conducted the first international mediation in a Hague case for NCMEC in November of 2005. He has received numerous awards from NCMEC, and a Certificate of Appreciation for Extraordinary Assistance to Hague Convention Applicants from the U.S. Department of State. Mr. Katz focuses on complex matrimonial and child custody cases and represents clients in cases of domestic violence, divorce, paternity and property matters. He also represents clients in complex cases involving international family law, parental kidnapping, interstate and international child custody and support, and out-of-state child abduction. As a respected and highly sought-after speaker, Mr. Katz has conducted seminars on topics such as child abduction, domestic and foreign freeze orders, and cross-border family mediation.

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The S&W International ChildFind Program of Sullivan & Worcester LLP in Boston, MA, New York, NY, and Washington, DC provides legal

assistance to parents of limited financial means, whose children have been abducted across sovereign borders. Through this program, with the help of Sullivan & Worcester LLP attorneys, left-behind parents can pursue remedies under international law, including the Hague Convention. The S&W International ChildFind Program and the lawyers at Sullivan & Worcester LLP who have volunteered for the program have helped reunite numerous abducted children with left-behind parents from a variety of foreign countries. Lawyers affiliated with the S&W International ChildFind Program have advised dozens of parents and children involved in international child abductions, appeared in a majority of the Hague Convention appeals to the First Circuit, and participated in many evidentiary hearings to resolve international custody disputes. The S&W International ChildFind Program has been a member of the International Child Abduction Attorney Network formed by the National Center for Missing and Exploited Children, receiving referrals through that network, as well as through the United States Department of State and other sources. They have also authored *amicus* briefs in other Hague Convention cases brought before the Court, in particular advocating in *Abbott v. Abbott* for a flexible analytical approach to *ne exeat* orders like the one that the Court ultimately adopted. The program is directed by Nicholas M. O'Donnell and Kevin M. Colmey, Partners in Sullivan & Worcester LLP's litigation department in Boston.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Curiae believe that the one-year period under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention")[2] must be subject to equitable tolling "in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."[3]

In 2006, the Government of the United States officially adopted this position regarding the question before the Court. The Government's position derived from its longstanding view, first articulated 20 years earlier, in 1986, that abducting parents who conceal the whereabouts of children in an effort to delay the filing of a Hague Convention petition should not be "permitted to benefit" from their misconduct.[4] In this case, the Government has turned course 180-degrees on the applicability of equitable tolling to Hague Convention cases.

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[2] Dated Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986).

[3] Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 577 (2006) (Response of the U.S. State Department); *see* Pet. App. 169a.

[4] *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).

As the Government previously recognized, the one-year period in Article 12 must be subject to equitable tolling to avoid incentivizing abducting parents to conceal the whereabouts of their children for as long as possible. An abducting parent has such an incentive for an obvious reason: the longer it takes a left-behind parent to locate his or her child and seek relief under the Hague Convention, the greater is the likelihood that lawful custody rights will never be determined, and that *de facto* custody will be awarded to the abducting parent by an American court as part of the "now settled" inquiry provided for in Article 12.

The Government's new position is that equitable tolling principles are inapplicable to Hague Convention cases. It contends that the doctrine is essentially superfluous because courts retain "equitable discretion" under Article 18 to "order the return of the child at any time," including after finding that a child is now settled, or after deciding, in light of "egregious" behavior by the abducting parent, to dispense altogether with the now settled inquiry. Pet. App. 171a-172a, 179a.[5] The Second Circuit adopted this reasoning and held, despite the contrary holdings of three other circuit courts of appeals, that equitable tolling does not apply in Hague Convention cases.

Based on their experience and expertise, *Amici Curiae* believe that the Second Circuit's decision

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[5] Article 18 refers to the word "power." With the phrase "equitable discretion" the Government "mean[s] to invoke broadly a court's inherent equitable authority." Pet. App. 172a n.2.

undermines the fundamental purposes of the Hague Convention, which are to deter child abductions and ensure the immediate return of abducted children so a proper determination of parental custody can be made in their country of habitual residence.

The overarching aim of the Convention is to *deter* child abductions by providing a prompt and efficient judicial mechanism to obtain the mandatory return of abducted children.[6] In contrast, the decision below has the perverse effect of *encouraging* parents to take their kidnapped children *to* the United States, and to conceal their whereabouts in the hope of later persuading an American court to find that the child has become settled in this country and, on that basis, deny the left-behind parent's petition to have the child returned.

Moreover, the Convention, its implementing legislation, and longstanding precedent make clear that a Hague Convention proceeding is *not* a child custody determination. Yet, allowing abducting parents to assert the now settled defense when they have concealed the whereabouts of their children, and thereby delayed the left-behind parent's filing of a petition, rewards the misconduct by

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[6] *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (stating that the "overarching intention of the Convention" is deterring child abduction); *Furnes v. Reeves*, 362 F.3d 702, 717 (11th Cir.) (stating that the aim of the Hague Convention is to deter abductions and ensure return so that custody decisions are made in the child's country of habitual residence), *cert denied*, 543 U.S. 978 (2004).

effectively converting every such case into a *de facto* custody battle in an American court.

Amici Curiae believe that the effect of the Second Circuit's decision will be more child abductions to the United States, and further victimization of those already abducted.[7] These children have been deprived of the love and affection of their left-behind parents and forced into a new way of life far from home by the unlawful actions of their abducting parents, and will now have the crucial questions of where they will be raised, and by whom, decided by the courts of a foreign land, rather than those of their own country. It is hard to imagine a more visceral violation of the spirit of the Hague Convention, and of the rights of the abducted children and left-behind parents the Convention was intended to protect.

For these reasons, and those set forth in Petitioner's Brief, *Amici Curiae* urge the Court to reverse the decision below and hold that the one-year period in Article 12 of the Hague Convention is subject to equitable tolling when (i) the left-behind parent exercised reasonable diligence in seeking to locate his or her child, (ii) the abducting parent concealed the whereabouts of the child, or

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[7] See Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 COLUM. J. TRANSNAT'L L. 677, 677 (1996) ("It goes virtually without saying that the true victim of the childnapping is the child himself, who suffers from the sudden upsetting of his stability, and the traumatic loss of contact with the parent who has been in charge of his upbringing . . . .") (citation and internal quotation marks and brackets omitted).

engaged in other misconduct that frustrates the left-behind parent's efforts to locate the child, and (iii) the abducting parent's concealment or other misconduct prevented the filing of a petition within one year of the child's abduction.

ARGUMENT

I. AN AFFIRMANCE OF THE JUDGMENT BELOW WILL INCENTIVIZE ABDUCTING PARENTS TO CONCEAL THE WHEREABOUTS OF THE CHILD

A. The Second Circuit's Decision Creates An Incentive To Conceal The Whereabouts Of An Abducted Child In Order To Prevent The Timely Filing Of A Hague Convention Petition

An abducting parent has every incentive to prevent the timely filing of a Hague Convention petition since a delay of more than one year allows the parent to attempt to demonstrate that the child should not be returned because she is now settled in this country. The Government recognizes this incentive, but argues that its pernicious effects can be minimized by courts' exercise of equitable discretion under Article 18 "to order the return of the child at any time." The Government's current view is that the court retains equitable discretion to order an abducted child's return even if she is settled; indeed, the Government posits that in "egregious" circumstances a court may exercise that

discretion to forego altogether an inquiry into whether the child is settled. Pet. App. 178a-179a.

Equitable discretion to order a child's return at any time, however, even after a now settled finding, is qualitatively different from the application of equitable tolling to preclude an abducting parent from asserting the now settled defense in the first place. Equitable discretion under Article 18 neither subsumes, nor is a substitute for, the doctrine of equitable tolling.

As a threshold matter, it is questionable whether the scope of equitable discretion under Article 18 is so broad as to allow a court to dispense with the now settled inquiry despite a petition having been filed more than one year after the abduction.[8] Arguably, the text of Article 12 precludes such an interpretation. It provides that when a proceeding has been commenced more than one year after the abduction, the child must be returned "*unless it is demonstrated* that the child is now settled in its new environment." Pet. App. 135a (emphasis supplied). Thus, after the passage of one year, Article 12 appears to vest an abducting parent with the

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[8] There is palpable tension in the Government's position. It argues that equitable discretion can be used in lieu of equitable tolling to achieve a "similar result," *i.e.*, dispensing with the now settled analysis, yet urges simultaneously that equitable tolling is inappropriate because it "would have the effect *—unintended by the Convention—of foreclosing a district court's analysis*" of the now settled question. Pet. App. 175a (emphasis supplied). Why dispensing with the now settled analysis is acceptable through an exercise of equity under one label but not another is left unaddressed.

procedural right to "demonstrate" that the child should not be returned because she is now settled.

If this view of Article 12 is correct, then the Government is left with the argument that equitable tolling is superfluous because, confronted with evidence of an abducting parent's "egregious" concealment, a court may achieve a similar result by exercising equitable discretion to order return despite finding that the child is now settled in the United States. Pet. App. 178a.

The potential exercise of equitable discretion *after* a now settled finding, however, does little if anything to curb the perverse incentive that naturally arises *before* a petition is filed, when abducting parents know they can procure the right to demonstrate that the child is now settled by virtue of the passage of time, and consequent delay in the filing of a petition, that will result from their concealment of the child's whereabouts.[9] And, it bears stressing, allowing an abducting parent to assert the now settled defense in this context transforms fundamentally the character of the proceeding, from one of a summary nature requiring the automatic return of the child (assuming no other defenses to return exist), into a fact-intensive, mul-

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[9] *See Duarte*, 526 F.3d at 569 (recognizing the "potentially prejudicial effect of failing to file within a year from removal"); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (holding that, absent equitable tolling "a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available").

tiple-factor inquiry regarding the child's current circumstances, during which the court's focus is shifted almost entirely away from the abducting parent's underlying misconduct.

Even if the Government's interpretation of the scope of Article 18 equitable discretion is correct, few courts faced with evidence of concealment are likely to simply dispense with the now settled analysis altogether. Not surprisingly, neither Petitioner nor *Amici Curiae* have found any reported case in the United States where a court has done so.

To the contrary, cognizant of the text of Article 12 and influenced by the understandable impulse to consider the child's interests, *Amici Curiae* believe that a court is far more likely to conduct the now settled analysis, knowing that it retains the power to order the child's return at the conclusion of the proceeding. It seems equally as likely that, after finding that a child is now settled in this country, few courts will exercise equitable discretion under Article 18 to order the child's return solely or primarily because the abducting parent's concealment created the delay that allowed the child to become settled.[10]

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[10] Among the many hundreds of reported Hague Conventions decisions, there appear to be only two where a court has ordered return despite a now settled finding. In *F.H.U. v. A.C.U.*, 48 A.3d 1130 (N.J. Super. Ct. App. Div. 2012), there was no evidence of concealment. In *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800 (N.D. Iowa 2003), the court ordered the return of the children after concluding that the abducting mother "should not ultimately benefit

For these reasons, the incentive to conceal remains as strong as ever despite the equitable discretion grounded in Article 18. Indeed, the facts of this case demonstrate just how powerful is that incentive. By concealing her daughter's abduction to France and then the United States and, thereafter, her whereabouts in this country, Respondent prevented Petitioner from timely filing his petition within one year of the child's abduction. This, in turn, allowed Respondent to assert the now settled defense. The District Court then conducted a factual inquiry into the child's circumstances, and ultimately awarded Respondent what amounts to *de facto* custody. The District Court acknowledged as much when it noted that to the extent Article 12 permits a court to deny return based on a now settled finding, "'*it effectively allows [the court] to reach the underlying custody dispute*, a matter which is generally outside the scope of the Convention.'" Pet. App. 93a (quoting *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001)) (emphasis supplied).

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from the effects of her own actions" whereby she "knowingly and successfully created language, cultural, distance and financial barriers to [the father's] efforts to seek return of his children to France." *Id.* at 815. Despite evidence of this misconduct, the court conducted the now settled analysis.

B. Application Of Equitable Tolling Principles To Article 12 Is Consistent With Developing Trends in Private International Law Regarding Child Abduction

The Second Circuit relied heavily upon the Pérez-Vera Explanatory Report on the 1980 Hague Child Abduction Convention ("Explanatory Report")[11] to support the conclusion that Hague Convention signatory states did not intend the one-year period in Article 12 to be subject to any sort of equitable tolling in cases where concealment delays a petition's filing. *See* Pet. App. 23a (concluding that "the drafters of the Convention saw value in agreeing to a 'single time-limit of one year' and setting aside 'the difficulties encountered in establishing the child's whereabouts'") (citing Explanatory Report ¶ 108). This was essentially the position urged by the Government. *See* 181a-182a.

The Government's view is that Article 12 provides no basis to equitably toll the one-year period in concealment cases because delegates considered, but ultimately declined to include any reference to the concept of tolling[12] due to the "considerable dif-

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[11] The Explanatory Report is reprinted at Pet. App. 150a-166a. It espouses the view that under Article 18 a court may decline to order a child's return even if she is settled in her new environment. Pet. App. 166a, at ¶ 112. The Explanatory Report does not, however, state that Article 18 allows a court confronted with an abducting parent's misconduct to dispense with the now settled analysis when the petition has been filed more than one year after the child's abduction.

[12] That the ability to toll the one-year period is not expressly set forth in Article 12 or elsewhere in the Conven-

ficulty" of determining when the left-behind parent "discovered, or should have discovered, the child's location." Pet. App. 182a. This view is somewhat incongruous given that the United States is a signatory to (although it has not yet ratified) the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility, and Measures for the Protection of Children (the "Hague Jurisdiction Convention").[13]

One of the principal purposes of the Hague Jurisdiction Convention is to delineate how long a contracting state from which a child has been abducted continues to have jurisdiction over custody when the child has been taken to another contracting state. The goal was to address "[o]ne of the serious problems with the application of" the Hague Convention, *i.e.*, "courts' apparent assumption in abduction cases that a non-return decision results in jurisdiction to deal with the custody of the child." Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L

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tion does not automatically preclude the application of such equitable principles. In *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013), the Court noted that the petitioner's claim for an order of "re-return" of the child, a form of relief not expressly authorized under the Convention, was not "implausible" either "under the Convention itself *or according to general equitable principles*" (emphasis supplied).

[13] The full text of the 1996 Convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70.

L. & POL. 83, 92 (2000-2001) ("DeHart, *Relationship Between Conventions*").[14]

Article 7 of the Hague Jurisdiction Convention provides that jurisdiction shifts to the state where the child has been taken only after she becomes settled there. Significantly, while Article 12 of the Hague Convention provides that a child may be found to be settled one year after her abduction if no petition is filed before then, regardless of the left-behind parent's knowledge of the child's whereabouts, Article 7(1)(b) of the Hague Jurisdiction Convention provides, in contrast, that jurisdiction shifts only when "the child has resided in that other State for a period of at least one year *after* the [left-behind parent] *has or should have had knowledge of the whereabouts of the child*, no request for return lodged within that period is still pending, and the child is settled in his or her new environment" (emphasis supplied).[15]

As noted in the explanatory report accompanying the Hague Jurisdiction Convention, the "underlying idea [behind Article 7] is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection" for the

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[14] Indeed, the District Court in this case apparently made this precise assumption. Pet. App. 114a (stating that, given the denial of the petition for return, "the custody arrangement of the child should be determined by a New York court").

[15] *See* http://www.hcch.net/upload/expl34.pdf, Article 7(1).

child.[16] In other words, while an abducting parent has an incentive under the Hague Convention to conceal the child's whereabouts because the passage of one year before a petition is filed can give rise to a settled finding, and thus potentially a shift of custody jurisdiction (or, as a practical matter, the granting of *de facto* custody), the Hague Jurisdiction Convention is designed to eliminate this incentive by providing that the one-year clock begins to run only *after* the left-behind parent "has or should have had knowledge of the whereabouts of the child." Under this framework, endorsed by the United States since it is a signatory, abducting parents are not rewarded for concealing the whereabouts of their children.[17]

Although the Hague Jurisdiction Convention has yet to be ratified[18] by the United States, its provi-

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[16] Explanatory Report by Paul Lagarde (15 Jan. 1997), ¶46, at 557, *available at* http://www.hcch.net/upload/expl34.pdf.

[17] As noted by the Permanent Bureau of the Hague Conference, "[i]n cases of international child abduction, the authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal retain [custody] jurisdiction" until the specific conditions in Article 7 are met, in order "to deter international child abduction *by denying any jurisdictional benefit to the abducting party*." Revised Draft Practical Handbook on the Operation of the Hague Convention of 19 October 1996 on Jurisdiction, Application of Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (May 2011), at ¶4.20, *available at* http://www.hcch.net/upload/wop/abduct2011pd04e.pdf.

[18] In the opinion of Gloria Folger DeHart, who as an Attorney Advisor with the U.S. Department of State was U.S.

sions regarding international child abductions will be implemented via states' adoption of the latest revisions to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), approved by the Uniform Law Commission in July 2013.[19] An earlier version of the UCCJEA already has been adopted by 49 states and the District of Columbia.

The intention to not reward kidnappers that underlies Article 7 of the Hague Jurisdiction Convention is consistent with the State Department's longstanding view that when an abducting parent conceals a child's whereabouts, "necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from" such misconduct. 51 Fed. Reg. 10,509. This Court should be guided by the State Department's original admonition, and the text and spirit of the Hague Jurisdiction Convention. As noted by the U.S. Del-

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Delegate to the Hague Conference on Private International Law that developed the Hague Jurisdiction Convention, the answer to the question of whether ratification of that Convention is "desirable" for the United States "is an unequivocal yes." DeHart, *Relationship Between Conventions*, 33 N.Y.U. J. INT'L L. & POL. at 100. Of course, the views expressed by Ms. DeHart were her own, and not those of the United States. The ABA passed a resolution in August 1997 urging ratification:

http://www.americanbar.org/content/dam/aba/migrated/domviol/ABA_Policies/122_2_2.authcheckdam.PDF

[19] http://www.uniformlaws.org/shared/docs/Hague_Convention_on_Protection_of_Children/2013AM_UCCJEA_As%20approved.pdf.

egate to the Hague Conference that developed the Hague Jurisdiction Convention, albeit not in an official capacity:

> The combined effect of the two Conventions is to make it completely clear that wrongful behavior should not be rewarded, and that the best interests of the child are served by following the Conventions' mandate and returning the child. Non-return is the last resort, not the acceptable alternative.

DeHart, *Relationship Between Conventions*, 33 N.Y.U. J. INT'L L. & POL. at 94.

In accordance with the State Department's view that the Hague Jurisdiction Convention "complements and reinforces" the Hague Convention, the Court should embrace an interpretation of Article 12 that is consistent with, and complementary to the Hague Jurisdiction Convention[20] and the revised UCCJEA. It should hold that abducting parents who conceal the whereabouts of their children may be precluded from asserting the now settled defense through the tolling of the one-year period or, alternatively, through application of equitable tolling principles as part of the exercise of equitable dis-

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[20] Press Release, Secretary of State Hillary Rodham Clinton, U.S. Signature of the Child Protection Convention (Oct. 22, 2010), *available at* http://www.state.gov/secretary/rm/2010/10/149860.htm; *see* DeHart, *Relationship Between Conventions*, 33 N.Y.U. J. INT'L L. & POL. at 90 ("Although the Conventions are independent, the relationship between them is very important. The 1996 Protection Convention *supplements and strengthens* the 1980 Child Abduction Convention . . . .") (emphasis supplied).

cretion under Article 18, and articulate the standard to be applied in either instance.

Conversely, rejection of the application of equitable tolling to Article 12 necessarily allows kidnappers to benefit from a qualitatively more favorable legal framework: a court's unmoored discretion replaces the bright-line mandate requiring the return of an abducted child. Worse, the *longer* the kidnapper conceals the child's whereabouts, in continued violation of the laws of his or her country, the more settled the child becomes in the United States and the more likely it is that the kidnapper will be awarded *de facto* custody, in defiance of the aims of both the Hague Convention and the Hague Jurisdiction Convention. Based on *Amici Curiae* practitioners' experience, this is often the case because many left-behind parents lack the financial resources or ability to travel to the United States to either challenge jurisdiction or litigate custody in the state where the abducting parent and child reside, a harsh reality recognized by the District Court.[21] Thus, the inability of courts to

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[21] In concluding that "the custody arrangement of [Petitioner's] child should be determined by a New York court," the District Court noted:

> The Court recognizes that this outcome is in many ways unfair to Petitioner, who has been denied access to his child for over two years now. And the Court recognizes that because neither Petitioner nor Respondent appears to have the finances or immigration status to be able to travel easily between the United Kingdom and New York for a custody hearing, this outcome does disadvantage Petitioner (and his opportunities to have a meaningful relationship with his child). . . .

Pet. App. 114a n.21

toll the one-year period sustains the abducting parent's incentive to conceal, often results in the abducting parent being awarded *de facto* custody, and inevitably rewards the most successful child abductors.[22]

C. Allowing Abducting Parents To Litigate The "Now Settled" Defense Despite Evidence Of Concealment Effectively Converts Each Hague Convention Proceeding Involving Concealment Into A *De Facto* Custody Determination

In 1988, Congress passed the International Child Abduction Remedies Act ("ICARA") to implement the Hague Convention. ICARA vests federal and state courts with jurisdiction to "determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4). ICARA "ensure[s] that such disputes are adjudicated in the appropriate jurisdiction," not in American courts. For this reason, if "courts find children to have been wrongfully removed or retained," ICARA requires them "'to be promptly returned.'" *Chafin*, 133 S. Ct. at 1022 (quoting 42 U.S.C. § 11601(a)(4)).

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[22] *Duarte*, 526 F.3d at 570 ("Logic and equity dictate that awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return would not only encourage child abductions, but also encourage hiding the child from the parent seeking return."). Denying abducting parents "any tactical advantages" as a result of their misconduct is consistent with the goals of the Hague Convention. *See Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004).

Barring application of equitable tolling to Hague Convention proceedings will undermine these principles of limited jurisdiction. It will permit an abducting parent who conceals a child's whereabouts effectively to litigate custody issues in an American court, rather than in the courts of the country of habitual residence where, consistent with the aims of the Hague Convention and the text of ICARA, custody determinations should be made.

By rejecting equitable tolling in Hague Convention cases, the Second Circuit makes it substantially more likely that American courts will end up doing precisely what Congress forbade: adjudicating Hague Convention proceedings as *de facto* child custody disputes.[23]

Moreover, since many Hague Convention cases involve concealment, and the majority are filed in federal district courts as opposed to state courts of general jurisdiction or family courts,[24] the avail-

[23] *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1015 (9th Cir. 2009) (holding that the Convention "is clear that a court considering a Hague petition should not consider matters relevant to the merits of the underlying custody dispute such as the best interests of the child, as these considerations are reserved for the courts of the child's habitual residence"); *see also Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008); *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005). *See generally* Ion Hazzikostas, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 423 n.9 (2004) ("Hazzikostas, *Federal Court Abstention*").

[24] As of August 26, 2013, a search of the LEXIS databases for all federal and state cases containing the phrases "Hague Convention" and "Child Abduction" returned 945 opinions. More than two-thirds, 645 in total, were federal

ability of equitable tolling in Hague Convention cases involving concealment would minimize the number of *de facto* custody disputes decided by federal courts. Such an outcome would be consistent with the policy underlying the longstanding "domestic relations" exception to federal jurisdiction, applicable in other contexts.[25] *See Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992) (discussing *Barber v. Barber*, 21 How. 582, 16 L.Ed 226 (1859)).

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court decisions. *See generally* Hazzikostas, *Federal Court Abstention*, 79 N.Y.U. L. REV. at 424 (noting that in light of the limited nature of federal courts' jurisdiction, compared to state courts far more familiar with determining child custody disputes, "many parents strongly prefer to litigate their ICARA claims in federal court").

[25] The exception has been recognized only in the context of diversity jurisdiction. *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1018-20 (3d Cir. 1984). Under ICARA, of course, federal courts have federal question jurisdiction to decide the now settled issue, but that inquiry is limited and not equivalent to a child custody determination. *Bromley v. Bromley*, 30 F. Supp. 2d 857, 861-62 (E.D. Pa. 1998) (stating that, except for the limited forms of relief available under the Hague Convention, state courts are better equipped to handle domestic relations matters). Indeed, in debating the passage of ICARA, there was "contentious" debate "about the appropriateness of federal jurisdiction over ICARA petitions," and Congress "was careful expressly to limit federal court jurisdiction to the narrow questions arising under the Hague Convention." Hazzikostas, *Federal Court Abstention*, 79 N.Y.U. L. REV. at 424 & n.13.

II. IN CONTRAST TO MOST HAGUE CONVENTION STATES, WHEN AN ABDUCTING PARENT CONCEALS THE CHILD'S WHEREABOUTS IN THE UNITED STATES, ICARA AND THE AMERICAN LEGAL SYSTEM CREATE SUBSTANTIAL OBSTACLES TO THE TIMELY FILING OF A PETITION

Amici Curiae practitioners are acutely familiar with another compelling reason the Court should hold that the one-year period in Article 12 is subject to equitable tolling in concealment cases: the complexities, costs, and unique legal obstacles that left-behind parents face when seeking the return of their children in an American court. Compared to other signatory states, the United States is one of the *least* accommodating Hague Convention states for left-behind parents.

The United States is currently a Convention partner with 77 other countries and special administrative regions under the Hague Convention.[26] The U.S. State Department provides country-specific information for 66 of them.[27] Nearly all 66

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[26] http://www.travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.

[27] *See* http://travel.state.gov/abduction/country/country_3781.html (last visited August 14, 2013). The State Department's webpage, although including several non-signatories and non-Convention partners, curiously omits information regarding: Cyprus, Luxembourg, Malta, Macau Special Administrative Region, Monaco, Peru, San Marino, Trinidad and Tobago, and three United Kingdom dependencies (the Cayman Islands, the Falkland Islands, and Montserrat).

Convention partners for which information is available make it far easier than does the United States to commence a Hague Convention proceeding.

In 26 Convention partners, for example, a left-behind parent need not bring suit at all.[28] Instead, after he or she files an application with the Convention Partner's Central Authority, the government commences the proceeding, either to represent the child's interests or its interest in enforcing the Convention. In an additional 15 Convention partners, the government appoints an attorney to represent the left-behind parent's interests, at no cost and regardless of the parent's income.[29] Thus, in roughly 62% (41 of 66) of our Convention partners, a left-behind parent does not need to spend precious weeks or months (or a small fortune) trying to locate suitable counsel or familiarize him or herself with a foreign legal system. Many left-behind parents cannot afford the cost of leaving their employment, traveling to the United States, and residing here for the duration of the litigation. It has been *Amici Curiae*'s experience that, like Petitioner,

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[28] Australia, the Bahamas, Belgium, Bermuda, Brazil, Burkina Faso, Costa Rica, Croatia, the Dominican Republic, El Salvador, France, Greece, Guatemala, Honduras, Hong Kong Special Administrative Region, Italy, Morocco, Panama, Portugal, Romania, St. Kitts and Nevis, South Africa, Spain, Sri Lanka, Turkey, and Venezuela.

[29] Austria, Bulgaria, Chile, Columbia, Denmark, Ecuador, Hungary, Ireland, Latvia, New Zealand, Norway, Slovenia, Ukraine, the United Kingdom, and the Isle of Man (as part of the United Kingdom). In addition, Costa Rica both prosecutes Hague Convention petitions itself, on behalf of the child, and appoints legal counsel for the left-behind parent.

many left-behind parents are forced to participate in the proceedings remotely. During the evidentiary hearing in this case, for example, Petitioner testified via videoconference from his *pro bono* counsel's London office, while Respondent appeared in person and rendered live testimony. Pet. App. 43a. This undoubtedly resulted in a significant tactical advantage for Respondent, the abducting, law-breaking parent.

In most of the remaining Convention partners within the group of 66, the relevant government authority provides at least *some* assistance. For instance, of the governments that neither commence suit nor guarantee counsel, eight (8) at least guarantee counsel depending on financial need; Germany offers all applicants legal representation for €1,500 (about $2,000).[30] And, with some overlap, 13 of these remaining governments provide left-behind parents with a streamlined process to file a court petition: the government either directly refers a Hague Convention application to the appropriate court, or designates one court or agency to hear all petitions.[31]

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[30] Argentina, Estonia, Netherlands, Poland, Serbia, Singapore, Slovakia, Sweden. In addition to these Convention partners, several governments *both* commence suit as plaintiff *and* guarantee the left-behind parents counsel based on financial need, including Bermuda, Brazil, Croatia, Hong Kong Special Administrative Region, and Panama.

[31] Bosnia and Herzegovina, Finland, Germany, Iceland, Macedonia, Mauritius, Mexico, Montenegro, Poland, Serbia, Singapore, Sweden, and Zimbabwe.

The United States does not and cannot offer similar assistance. Our Central Authority, the U.S. State Department's Office of Children's Issues, does not prosecute Hague Convention proceedings, or appoint or guarantee counsel, even to the financially destitute. And while Article 7(f) of the Convention requires governments to "initiate or facilitate the institution of . . . proceedings," because there is no procedure set forth in ICARA allowing our government to initiate Hague Convention proceedings or single court designated to process them, the State Department can neither stop the clock by filing a petition nor refer a left-behind parent to a specific court so he or she may do so. Thus, even if a parent files a prompt *application* with the State Department in its capacity as Central Authority, the one-year clock keeps ticking[32] while he or she tries desperately to retain counsel or locate *pro bono* counsel, or learn enough about the U.S. legal system (and often the English language) to proceed *pro se*.

When an abducting parent is successful in concealing the child's whereabouts, ICARA's jurisdictional requirements increase these burdens exponentially. To file a petition in an American court the left-behind parent must identify that court "which is authorized to exercise its jurisdic-

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[32] Under ICARA, the "commencement of proceedings" contemplated in Article 12 "means, with respect to the return of a child located in the United States, the filing of a petition" "in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. §§ 11603(b), (f)(3).

tion in the place *where the child is located at the time the petition is filed.*" 42 U.S.C. § 11603(b) (emphasis supplied). Like many of *Amici Curiae* practitioners' clients, left-behind parents who do not know where their children are living in the United States cannot assert in good faith that any particular state or federal court has jurisdiction. Indeed, even if a parent knows the general geographic *region* where the child may be residing, state boundaries may pose insurmountable jurisdictional hurdles.

For example, through diligence or sheer good luck, a left-behind parent may learn that an abducting parent works in New York. But, particularly if the left-behind parent lacks sufficient financial resources to hire a private investigator, it may take much longer to uncover whether the abducting parent (and thus the child) lives in New York, or commutes from New Jersey, Connecticut, or Pennsylvania. Without such crucial information, often intentionally concealed or difficult to discover when, as is often the case the abducting parent, like Respondent, resides illegally in the United States, the left-behind parent will be unable to allege sufficient facts to establish a court's jurisdiction under ICARA.

This case demonstrates how frustratingly difficult filing suit in the United States can be. Petitioner filed his application with the United Kingdom's Central Authority on March 15, 2010. Pet. App. 43a. A mere eight days later, the Central Authority forwarded his application to the U.K. Office of Children's Issues. *Id.* Yet it was not until

July 27, 2010, more than four months later, that Petitioner located *pro bono* counsel in the United States. Petitioner's Merits Brief at 16. And it was not until November 2010 that Petitioner (with the aid of *pro bono* counsel and private investigators) was able to discern the specific location of the child. *Id.* at 16-17.

Given the contrast with applicable procedures in other signatory states, it is no surprise that the United States has increasingly become a destination of choice for kidnappers. In fact, reported abductions of children to the United States *rose* 31% from 2011 to 2012.[33] Allowing application of the doctrine of equitable tolling to Hague Convention cases will not eliminate the scourge of child abduction. But holding that the one-year period in Article 12 is subject to equitable tolling will help deter kidnappers who conceal the whereabouts of their abducted children in order to frustrate the lawful efforts of left-behind parents seeking their return, and at a minimum will ensure they are not rewarded for their misconduct.

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[33] Compare http://travel.state.gov/pdf/Incoming_ Stats2011.pdf (361 children reported abducted to the U.S. in 2011) *with http://travel.state.gov/pdf/CY2012-Incoming_Openstats.pdf* (473 children reported abducted to the U.S. in 2012).

CONCLUSION

For the reasons stated, *Amici Curiae* urge this Court to reverse the decision of the Second Circuit and hold that the one-year period in Article 12 of the Hague Convention is subject to equitable tolling when (i) the left-behind parent has exercised reasonable diligence in seeking to locate his or her child, (ii) the abducting parent concealed the whereabouts of the child, or engaged in other misconduct that frustrates the left-behind parent's efforts to locate the child, and (iii) the abducting parent's concealment or other misconduct prevented the filing of a petition within one year of the child's abduction.[34]

If the Court affirms, and concludes that the question of whether to dispense with the now settled

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[34] This standard is consistent with that adopted by the Ninth and Eleventh Circuits, which have held that the one-year period in Article 12 is subject to equitable tolling when an abducting parent takes steps to conceal the child's whereabouts and the concealment delays the filing of the left-behind parent's petition. *Duarte*, 526 F.3d at 569-70; *Furnes*, 362 F.3d at 723; *see In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) ("adher[ing] closely to parameters set by *Duarte*"). In addition to demonstrating diligence, left-behind parents should not be required to prove either "egregious" concealment, as intimated by the Government, or "extraordinary" circumstances. In light of ICARA's jurisdictional requirements, the act of concealment is *the* circumstance that prevents the proper filing of a petition altogether until the child's whereabouts are discovered. Articulation of a specific standard by this Court will provide guidance to district courts, and help ensure a uniform application of the doctrine in Hague Convention cases. *In re B. del C.S.B.*, 559 F.3d at 1009.

analysis in cases of concealment or other misconduct lies within the equitable discretion afforded under Article 18 to order return of the child "at any time," it should hold that the above standard informs a court's exercise of such discretion. In either instance, the Court should also determine the applicable standard of appellate review.[35]

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[35] The Court's guidance is needed given the uncertainty surrounding the question of whether application of equitable tolling, or, alternatively, the exercise of equitable discretion, is subject to review only for abuse of discretion or to *de novo* review. The Ninth Circuit has held that, while an application of equitable tolling ordinarily is reviewed under an abuse of discretion standard, tolling in the Hague Convention context is subject to *de novo* review, with the district court's factual findings reviewed for "clear error." *In re B. del C.S.B.*, 559 F.3d at 1008-1009. In *Furnes*, the Eleventh Circuit simply "conclude[d] that the district court did not err in applying equitable tolling given the facts found by the district court." 36 F.3d at 724. On the other hand, in advocating adoption of the equitable discretion standard the Government "[p]resum[ed]" that a court's exercise of such discretion would be "reviewed on appeal for abuse of discretion." Pet. App. 179a n.7. This is a far more deferential review of an equitable determination that is essentially the same as an application of equitable tolling since, as the Government contends, equitable discretion "may, in appropriate cases, yield a similar result" to equitable tolling. The Second Circuit adopted the equitable discretion standard, but left the appellate review question undecided. *Lozano v. Alvarez*, 697 F.3d 41, 50 n.5 (2d Cir. 2012), *cert. granted*, (U.S. June 24, 2013) (No. 12-820). To help ensure uniformity in concealment cases where equitable tolling is applied, *Amici Curiae* urge the Court to adopt the *de novo* review standard articulated by the Ninth Circuit in *In re B. del C.S.B.*

Dated: September 6, 2013

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP), BATTERED WOMEN'S JUSTICE PROJECT, FAMILY VIOLENCE APPELLATE PROJECT, LEGAL MOMENTUM, AND TAHIRIH JUSTICE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP), BATTERED WOMEN'S JUSTICE PROJECT, FAMILY VIOLENCE APPELLATE PROJECT, LEGAL MOMENTUM, AND TAHIRIH JUSTICE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The Domestic Violence Legal Empowerment & Appeals Project (DV LEAP), Battered Women's Justice Project, Family Violence Appellate Project, Legal Momentum, and Tahirih Justice Center respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF THE AMICI CURIAE

Amici curiae are organizations combating domestic violence and abuse of children through litigation, legislation, and policy initiatives. The identities and interests of amici are described in the Appendix to this brief. Amici have extensive experience working with survivors of domestic violence and protective parents and engaging in legal and policy reform on

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[1] Petitioner filed a letter with the Clerk of the Court providing blanket consent to the filing of amicus briefs pursuant to Rule 37.3(a). A letter from counsel for respondent consenting to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

behalf of those individuals. Some amici previously have filed an amicus brief in a case involving the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), as these cases frequently involve victims of domestic violence who have fled with their children for safety. *See, e.g.*, Brief for Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) et al. as Amici Supporting Respondent, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010) (No. 08-645).

INTRODUCTION AND SUMMARY OF ARGUMENT

Not all concealment is the same. Concealing a child's current location is not necessarily blameworthy, nor is it incompatible with child well-being. Concealment frequently is essential—even lifesaving—when adult and child victims of domestic violence flee their abusers.

Primary caregivers, usually mothers, comprise the great majority of taking parents in Hague Convention cases. All too often, these mothers are fleeing to escape family violence. The Hague Convention was never intended to trap parents and children in lives of violence. Yet compelling the return of a child in these circumstances through Hague Convention proceedings condemns these victims to just such an outcome.

Empirical evidence shows that abuse in the family, even if a child "only" witnesses it, can be and often is profoundly traumatizing and destabilizing to a child's well-being. Removing children from an abusive parent to a safe and stable home elsewhere is critical to their recovery and resilience. On the other hand, stripping children from a protective parent to return them to an abusive parent ensures their further psychological harm and threatens continued or escalated violence.

The well-settled defense at issue in this case is vital to protecting victims of abuse and their children.

This defense recognizes that, even where international abduction has occurred, there comes a time when custody litigation should occur in the place where the child is well-settled. The defense authorizes a court to refuse to return a child to the country of habitual residence for custody adjudication where: (1) more than a year has elapsed since the time of removal; and (2) the child is "now settled in its new environment." Hague Convention on the Civil Aspects of International Child Abduction, art. 12, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention]. Uprooting a child in the aftermath of an international abduction can cause its own harm; this is particularly true when the parent's original abduction was a flight to safety.

This Court should reject equitable tolling, as it bars the availability of the well-settled defense without recognizing differences in types of concealment. Extensive research demonstrates that risks of violence against women and children are greatest at and after separation from the abuser. Abusers routinely attempt to recapture their victims, and if those victims are found, the risks to their health and safety escalate significantly. Federal and state laws already recognize that concealment for purposes of safely escaping domestic violence is sometimes essential. Permitting concealment to toll the one-year timeframe in Hague Convention cases so that the well-settled defense is unavailable therefore would greatly exacerbate the risk of unwarranted and dangerous return orders.

The Hague Convention neither requires nor contemplates exposing victims of violence to these dangers. To the contrary, the Convention's drafters considered but rejected a limitation of the well-settled defense based on parental concealment. This rejection reflects the Convention's emphasis on furthering the best interests of children above all.

Moreover, in cases involving abuse, equitable tolling of the Hague Convention's well-settled defense would effectively impose a policy of requiring fleeing domestic violence victims to disclose their location to abusers despite the risks to their and their children's safety. Tolling in such cases would serve no purpose but to reward abusers whose conduct is so injurious that international flight and hiding provides the only safe escape.

This case demonstrates the dangers of permitting equitable tolling. This should not even be a concealment case. The district court found that respondent Diana Lucia Montoya Alvarez (Montoya Alvarez) "did not conceal the child to an extent that would" compel the child's return to England for custody proceedings. *In re Lozano*, 809 F. Supp. 2d 197, 230 (S.D.N.Y. 2011). If Montoya Alvarez's conduct here—where she did little or nothing to hide her child—is deemed concealment, this Court should expect that "concealment" will frequently be alleged, even where that allegation is unwarranted. Because petitioner Lozano has argued that Montoya Alvarez's so-called concealment entitles him to equitable tolling, this

question and its implications for children's safety and well-being are therefore relevant to this case.

Instead of equitable tolling, this Court should recognize that the facts surrounding concealment may be considered as part of determining whether a child is well-settled. Such a result would recognize the common-sense reality that concealment often is necessary, beneficial, and even lifesaving for children as when it allows escape from family violence. This holding is compelled by both the purposes of the Convention and the realities of domestic violence. It also has already been adopted by several of our treaty partners.

ARGUMENT

EQUITABLE TOLLING IS INAPPROPROPRIATE WHEN CONCEALMENT IS USED TO ESCAPE DOMESTIC VIOLENCE

A. Hiding For Safety Is Not The Same As Hiding For Litigation Advantage

Custodial mothers make up the great majority of taking parents, and these parents frequently report that they are fleeing with their children to escape domestic violence. In such cases, concealment may be essential to enabling safety, security, and stability for children and their primary caregivers. This is true in part because the time following separation often is the most dangerous for domestic violence victims and their children. Abusers frequently seek to recapture their victims and subject them to further abuse.

Abusers similarly may escalate violence against children if their mother leaves.

1. Hague Convention cases frequently involve mothers and children fleeing abuse

a. The modern face of international child abduction does not match the paradigm that drove adoption of the Hague Convention. The Hague Convention's return remedy grew out of concern about child abductions by parents who lacked "rights of custody." *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 602-603, 607-609 (2000) [hereinafter Weiner, *International Child Abduction*]. The United States congressional proceedings leading to ratification of the Hague Convention focused on that same image of international child abduction, describing "the abductor [as] a male non-custodial parent, usually a foreign national, who removed the child from the child's mother and primary caretaker, typically an American national." *Id.* at 602.

But that image no longer fits reality. Empirical studies now show that "two-thirds of abductors involved in Hague proceedings are primary caretakers, mostly mothers, and * * * this gives rise to issues which had not been foreseen by the drafters of the Convention." Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments*, 1 Utah L. Rev. 221, 282 (2008) [hereinafter Weiner, *Half-Truths*] (internal quotation marks omitted). "In 2008, 69% of the taking persons were the mothers of the children

involved * * *." Nigel Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 14 (2011), *available at* http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf. Of those taking mothers, 88% were also the primary caregiver. *Id.* at 6.

These caregivers frequently are motivated to flee because of domestic violence perpetrated against them and their children. A study of international child abductions reported that "taking parents primarily identified either abuse of themselves or their children as a reason to leave the country where they were residing." Taryn Lindhorst & Jeffrey L. Edleson, Battered Women, Their Children, and International Law 106 (2012) (describing Reunite Int'l, The Outcomes for Children Returned Following an Abduction (2003) [hereinafter Outcomes for Children]). Moreover, in questionnaires submitted to the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, "country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent in Hague proceedings." Weiner, *Half-Truths*, *supra*, at 223 n.5. Yet another study found that approximately one-third of all published or unpublished United States Hague Convention cases mentioned family violence. Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of*

International Parental Child Abduction, 11 Violence Against Women 115, 120 (2005).

This case similarly involves a mother who fled reported domestic violence. Montoya Alvarez explained in detail the physical, sexual, and emotional abuse Lozano inflicted on her. Both Montoya Alvarez and Lozano are originally from Colombia, though they met and resided together in London, England. *In re Lozano*, 809 F. Supp. 2d at 203-204. Montoya Alvarez testified that, shortly after she and Lozano began living together, "he began to treat her badly, insult her on a regular basis, and be generally very controlling." *Id.* at 204. Lozano "tried to kick her in the stomach when she was pregnant" and "pulled her out of bed one night when she received a wrong number phone call and called her a prostitute." *Ibid.* The violence escalated. Lozano raped Montoya Alvarez four times. *Ibid.* He repeatedly told Montoya Alvarez "to kill herself" and he "threatened to take the child away from her." *Ibid.* On several occasions, Montoya Alvarez asked Lozano to leave the home, but "he always threatened her in response." *Id.* at 208 n.9. Upon her arrival in the United States, a therapist diagnosed Montoya Alvarez with post-traumatic stress disorder (PTSD) resulting from the abuse and the stress of fleeing and hiding from Lozano. *Id.* at 206.

The district court found Lozano's assertions that he never had "insulted or mistreated" Montoya Alvarez "not credible." *Ibid.* The district court also observed that "it is extremely unlikely that [Montoya

Alvarez] would choose to flee her home with her child * * * for absolutely no reason." *Ibid.* While the district court declined to find further specific facts as to the abuse Montoya Alvarez endured, it also did not reject or refute Montoya Alvarez's testimony. The Court of Appeals affirmed these findings on appeal. *Lozano v. Alvarez*, 697 F.3d 41, 58 (2d Cir. 2012).

b. Parents who "abduct" their children to escape abuse frequently are seeking to protect those children, not just themselves. In some instances, children are direct victims of abuse; in others, they witness abuse of their mothers. But even where courts in Hague Convention cases recognize the existence of domestic violence, courts often lack an understanding that domestic violence injures children as well.

Where a parent is abused, children also often are physically harmed, either intentionally or unintentionally. Child mistreatment co-occurs with abuse by one parent against the other approximately 41% of the time. Shetty & Edleson, *supra*, at 126. Over the course of a child's lifetime, that risk rises to more than 50%. Lindhorst & Edleson, *supra*, at 108. Among other things, children may be physically hurt when they intervene in their parents' violence. One study documented that, in the group of battered mothers and children studied, 26% of children were intentionally hurt and 38% of children were unintentionally hurt during an incident of adult-to-adult violence. Lyungai F. Mbilinyi et al., *What Happens to Children When Their Mothers Are Battered? Results*

from a Four City Anonymous Telephone Survey, 22 J. Fam. Violence 309, 312 (2007).[2]

Moreover, empirical research demonstrates that witnessing abuse of a parent is psychologically harmful for children. In fact, research has shown that children who witness adult abuse are "not significantly different from children who were physically abused or who were both physically abused and exposed to violence." Lindhorst & Edleson, *supra*, at 109; *see also* G. Anne Bogat et al., *Trauma Symptoms Among Infants Exposed to Intimate Partner Violence*, 30 Child Abuse & Neglect 109 (2006); Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk and Resilience Framework for Research and Intervention*, 22 J. Fam. Violence 151, 151-152, 156 (2007); Shetty & Edleson, *supra*, at 126. Lindhorst and Edleson, reviewing the existing research on children exposed to domestic violence, explain that these children suffer "serious developmental difficulties, including emotional and behavioral problems and academic difficulties" similar to those found in children who are directly victimized. Lindhorst &

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[2] This same research also demonstrates that mothers often are abused when they attempt to protect their children from harm. *See* Mbilinyi et al., *supra*, at 312 (reporting that nearly half of the mothers surveyed reported that they were intentionally hurt while intervening to protect their children from abuse). Latina mothers are statistically more likely than women of other ethnic or racial groups to be injured when trying to protect their children. *Id.* at 315.

Edleson, *supra*, at 109; *see id.* at 108-110. Adult domestic violence thus is highly correlated with behavioral problems in children, "including externalizing behavior such as aggression and disobedience, and internalizing behavior such as depression, sadness, and lack of self-confidence." *Id.* at 109. Children exposed to domestic violence are less resilient, have lower capacity for problem solving and autonomy, and have lower cognitive functioning overall. *Ibid.*

Despite the well-established harms to children exposed to parent-on-parent violence, the United States State Department has observed that many courts in the United States "seem disinclined" to refuse to return a child in a Hague Convention proceeding where "the left-behind parent did not physically harm the child notwithstanding facts that show that the left-behind parent was violent toward the taking parent." United States Responses to Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 16 (2010).

This case reflects the statistics of co-occurring harm. On two of the occasions on which Lozano raped Montoya Alvarez, the child was in the room. *In re Lozano*, 809 F. Supp. 2d at 204 n.5. The child's nursery manager in London concluded without

contradiction that the "home environment obviously had a negative effect upon the child." *Id.* at 207 (internal quotation marks and alteration omitted). The child became an elective mute (i.e., she stopped speaking) and was very withdrawn, which the child's therapist in the United States described as possible symptoms of trauma. *Ibid.* A psychiatric social worker who treated the child after her arrival in the United States eventually diagnosed her with PTSD, a condition that improved dramatically within months of the child's resettlement in the United States. *Id.* at 212. Although the district court accepted these diagnoses and observations, it nonetheless declined to find that return would have posed a "grave risk" to the child. *Id.* at 224-225.[3] The well-settled defense

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[3] There should be no illusion that the dangers to children from domestic and family violence can adequately be resolved under Article 13(b) alone, which permits a Hague court to refuse to return a child where "there is a grave risk" that returning the child "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b). Although this Court instructed in Abbott that "grave risk" to a mother's safety may be "sufficient to show that the child too would suffer 'psychological harm' or be placed 'in an intolerable situation,'" *Abbott*, 130 S. Ct. at 1997, trial courts continue to find violence against the taking parent irrelevant to the child's well-being. *See, e.g.*, *Avendano v. Smith*, 806 F. Supp. 2d 1149, 1177 (D.N.M. 2011) ("grave risk" not supported despite "evidence that [petitioner] raped and abused" mother because abuse was not directed at child directly); *Aly v. Aden*, No. 12-1960, 2013 WL 593420, at *17 (D. Minn. Feb. 14, 2013) (despite four instances of physical abuse against the mother, Article 13(b) defense rejected because "these incidents of violence have not directly impacted [the child]. This violence

(Continued on following page)

was therefore crucial to preserving this child's well-being.

2. *Abused women often flee overseas because they are not protected in the place of habitual residence*

International flight is sometimes the safest option available for domestic violence victims and their children. Outside resources and support are critical for victims to escape or to end domestic abuse. Indeed, many women fleeing with their children to the United States do so to "seek the support of parents or other relatives who [are] already residing here." Lindhorst & Edleson, *supra*, at 91. Research shows that parental "abduction" by domestic violence victims is more likely "when the courts and community have failed to take the necessary steps to protect them from abuse or to hold the abuser accountable." Janet R. Johnston et al., *Early Identification of Risk Factors for Parental Abduction*, Juvenile Justice

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was not perpetrated against [the child], and only one incident allegedly occurred in [the child's] presence"). Nothing in the text of the Convention requires that parents fleeing domestic violence be limited to the Article 13(b) defense. And given that the Article 12 well-settled defense applies only after one year, domestic violence is potentially relevant to both. Since under Article 13(b), "[c]ourts have generally rejected the argument that grave psychological harm would result from a child's separation from a parent with whom that child has formed a strong bond," *Carranco v. Munoz*, No. 12-7299, 2013 WL 150760, at *9 (D.N.J. Jan. 14, 2013), the availability of the well-settled defense is especially critical in these cases.

Bulletin, Mar. 2001, at 3, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/185026.pdf.

Unfortunately, treaty partners of the United States do not always have adequate legal protections for these victims. The United States State Department's Country Reports on Human Rights Practices document these legal deficiencies among many signatories to the Convention. For instance, a United Nations investigator observed that Italy's "fragmented legal framework, inadequate investigation of incidents and punishment of perpetrators, and poor compensation for female victims of violence contributed to an atmosphere of silence and invisibility surrounding the problem [of violence against women]." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices: Italy 15 (2012), *available at* http://www.state.gov/documents/organization/204510.pdf. Italian women "perceived the government's response to complaints of violence as neither appropriate nor helpful." *Ibid.* In Guatemala, the police "often failed to respond to requests for assistance related to domestic violence, and * * * few officers received training to deal with domestic violence or assist victims." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights

Practices: Guatemala 16 (2012), *available at* http://www.state.gov/documents/organization/204664.pdf.[4]

"[P]olice and court systems" are the resources most needed by women combatting domestic violence, but often these "systems [do] not effectively intervene on behalf of the women" before they flee for safety with their children. Lindhorst & Edleson, *supra*, at 69. Unfortunately, these systemic failures are widespread, even in places of habitual residence that may have protective laws and that many perceive as relatively "safe." *See, e.g.*, *id.* at 133. As Judge Posner recognized in addressing allegations of domestic violence in a Hague Convention case, "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations." *Van De Sande v. Van De Sande*, 431 F.3d 567, 570-571 (7th Cir. 2005).

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[4] *See also, e.g.*, Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices: Morocco 22-23 (2012), *available at* http://www.state.gov/documents/organization/204586.pdf ("The government generally did not enforce the law [against sexual assault]. * * * The police selectively investigated cases; among the minority brought to trial, successful prosecutions were rare. * * * [P]olice generally treated domestic violence as a social rather than a criminal matter."); Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices: Ukraine 31 (2012), *available at* http://www.state.gov/documents/organization/204561.pdf ("Domestic violence against women remained a serious problem. Spousal abuse was common. * * * Human rights groups noted low capacity to detect and refer cases of domestic violence and reported that preventive services remained underfunded and underdeveloped.").

Recent global events underscore that victims cannot always rely on police and other legal institutions to protect them from continued abuse, even in developed countries like those of Western Europe. For instance, enforcement problems continue to plague legislative efforts to reduce domestic violence in the United Kingdom, the place of habitual residence in this case. In 2010, an internal investigation examining police handling of "domestic abuse cases where the woman has been seriously injured or killed" found that "failure[s] to prevent deaths and serious injuries [were] in part explained by police attitudes." UK CEDAW Working Group, Shadow Report, Women's Equality in the UK—A Health Check app. 32, at 6 (2013), *available at* http://thewomensresourcecentre.org.uk/wp-content/uploads/Appendix-32_Violence-against-women-and-girls-and-the-law_FINAL2.pdf. "In some cases police did not listen to or believe victims who asked for help. In other cases, police appeared not to understand DV [(domestic violence)], did not identify risks or appreciate how these might escalate." *Ibid.* Indeed, "[n]umerous independent reports have criticised the police for their insensitive and dismissive approach to victims of sexual violence." *Id.* at 4. Research on police reporting in the United Kingdom shows that police discount allegations of rape "four times as often as allegations of grievous bodily harm." *Id.* at 3. Thus, even countries that have long recognized domestic violence as a problem often have gaps in practice that leave victims in harm's way. *Cf. Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

Consistent with these data, Montoya Alvarez received little assistance in stopping Lozano's abuse in London. Montoya Alvarez reported the abuse Lozano inflicted on her and explained that "she feared for her and her child's safety." *In re Lozano*, 809 F. Supp. 2d at 205. But the police "declined to become involved in what they termed a custody issue." *Ibid.* And like many victims of family violence, when Montoya Alvarez and her child fled, they settled in a place where they could find support—with Montoya Alvarez's sister in New York. *Id.* at 211.

3. Concealment can be essential to safety

a. Flight—even international flight—may be insufficient to protect victims of domestic violence and their children from further harm. Concealment often plays a crucial role in safely escaping domestic violence because "most abusive men continue to search for and abuse their prior partners" when those partners attempt to flee to safety. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 281 (1995). "An abused woman must be able to keep her whereabouts confidential because many abusive and controlling men spend enormous amounts of time and effort spying on, seeking out, following, and harassing their victims." *Ibid.* That victims often need to hide from their abusers is reflected in the fact that organizations assisting domestic violence victims routinely conceal their exact location. *See* Kristen M. Driskell, *Identity Confidentiality for Women Fleeing Domestic*

Violence, 20 Hastings Women's L.J. 129, 131 (2009) ("[M]any family violence clinics keep confidential the location of the clinic, itself, as well as the names and addresses of all its clients to prevent abusers from finding their victims.").[5]

Thus, for some survivors of domestic violence, "truly regain[ing] safety and autonomy" may require "flee[ing] with their children to a confidential out-of-state location." Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 Fam. L.Q. 109, 110 (2005).

Concealment also can be essential for safely escaping domestic violence because victims are at greatest risk of violence at the time of separation and thereafter. "[T]he period of time during divorce or separation proceedings can be the most dangerous time for the victim because it is a time when the perpetrator feels as though he or she is losing control of the partner." Victoria L. Lutz & Cara E. Gady, *Necessary Measures and Logistics to Maximize the*

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[5] In this case, when Montoya Alvarez first fled with her child, they resided principally in a domestic violence shelter before departing for the United States. *In re Lozano*, 809 F. Supp. 2d at 209. Of course, these acts are not relevant to the well-settled defense because the Convention is not triggered until a parent crosses an international border. But Montoya Alvarez and her child are among the many domestic violence victims for whom going to a shelter contributes to safety.

Safety of Victims of Domestic Violence Attending Parent Education Programs, 42 Fam. Ct. Rev. 363, 363-364 (2004). Research shows that stalking is much more likely to occur following separation. Patricia Tjaden & Nancy Thoemmes, Extent, Nature, and Consequences of Intimate Partner Violence 37 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf. And "imposition of a pattern of control over his partner" is "[t]he overarching behavioral characteristic of the batterer." Lundy Bancroft, Jay G. Silverman & Daniel Ritchie, The Batterer as Parent 6 (2d ed. 2012); *see* Lindhorst & Edleson, *supra*, at 29. This dynamic of control manifests in abusive behavior that often escalates if a victim leaves her abuser or seeks assistance from the legal system. "Abusive husbands are more likely to seriously harm or kill their wives" at the time of separation and thereafter. Johnston et al., *supra*, at 10. Indeed, "[r]esearch has determined that 75% of spouse-on-spouse assaults occur after separation or divorce." Lutz & Gady, *supra*, at 363; Lindhorst & Edleson, *supra*, at 64 (reporting Hague Convention case studies in which separation did not end violent behavior and often escalated it).

The dissolution of a relationship in which a parent is being abused also increases risks of harm for children—even if an abusive parent did not previously abuse the children directly. "Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued

dominance and control of the mother and children." Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, Juv. & Fam. Ct. J., Nov. 1992, at 3, 33-34. Abusive parents "may turn to abuse and subjugation of the children as a tactic of" controlling a partner who is "seeking to establish autonomy and independence." *Id.* at 34 (citing Evan Stark & Ann Flitcraft, *Women and Children at Risk*, 18 Int'l J. Health Servs. 97 (1988)).

These heightened risks of harm to victims and their children following flight are evident in Hague Convention cases. When a court requires a child to be returned to the country of habitual residence, the protective parent often feels compelled to follow in order to maintain contact with, and to protect, her child. *See* Lindhorst & Edleson, *supra*, at 136-141. Many such victims subsequently experience renewed or increased violence. *Ibid.* (reporting "new domestic violence" incidences against victims on return, including threats, stalking, and physical abuse).

Lindhorst and Edleson have documented several episodes of escalating violence toward children in Hague Convention cases ordering returns. *See* Lindhorst & Edleson, *supra*, at 137 (reporting that after "Ruth*" was required to return her children to her husband, "they became the targets of his abuse"); *ibid.* (reporting that, upon return to the country of habitual residence, "Tamara's* children experienced an escalation of the emotional abuse their father exhibited prior to Tamara's* decision to flee with the children to the United States"). Other sources

similarly document the dangers domestic violence victims and their children face on return. For instance, in 2007, Cassandra Hasanovic and her two young sons fled the United Kingdom for Australia after her husband sexually assaulted her. Paola Totaro, *Young Mother Fled To Sydney To Save Her Life*, Sydney Morning Herald, May 2, 2009, http://www.smh.com.au/world/young-mother-fled-to-sydney-to-save-her-life-20090501-aq5z.html. Hasanovic and her children lived safely in the suburbs west of Sydney, where Hasanovic had relatives, until a Hague Convention order instructed Hasanovic to return her sons to the United Kingdom. *Ibid.* Hasanovic returned with her sons, and several months later, her husband dragged her from a car and stabbed her to death in front of her young sons and mother. Lindhorst & Edleson, *supra*, at 23.[6]

These studies not only underscore the heightened risks of violence to children, as well as their mothers, that follow separation and recapture; they also reinforce that not all flight and concealment is equal. Where domestic violence has occurred, flight and concealment may be essential for children's safety

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[6] The risks of escalating violence upon return are so persistent that even court orders intended to protect returning domestic violence victims and their children rarely provide protection on return to places of habitual residence. *See* Outcomes for Children, *supra*, at 31-32 (documenting that court orders known as "undertakings" were violated *in every case* in which those orders specifically addressed violence).

and well-being. Treating this conduct as blameworthy puts mothers and children at greater risk.

b. Legal institutions in the United States consistently recognize the importance and legitimacy of concealment for individuals fleeing domestic violence. At both the federal and state level, statutes addressing flight and concealment often single out or make exceptions for domestic violence. For instance:

At the federal level, the Family Violence Prevention and Services Act mandates that the address or location of any federally funded domestic violence shelter "shall * * * not be made public," except with the written authorization from the principal operators of the shelter. 42 U.S.C. § 10406(c)(5)(H); *see generally id.* §§ 10401-10413 (2000). This Act prioritizes protecting "the confidentiality and privacy" of "adult, youth, and child victims of family violence, domestic violence, or dating violence, and their families." *Id.* § 10406(c)(5)(A). And the Act explicitly links that confidentiality to "ensur[ing] the safety" of these victims and their families. *Ibid.*

States also have enacted measures recognizing that concealment plays an essential and valid role in escaping domestic violence. For instance, States ordinarily allow members of the public to access voter registration and drivers' license information, which includes current address information. Nat'l Coalition Against Domestic Violence, Address Confidentiality Programs 1 (2007), *available at* http://www.ncadv.org/files/ACPPrograms.pdf. Abusers frequently search

these kinds of records, obtain the new physical addresses of their victims, and attempt to stalk or recapture them. *Ibid.* In response, "[t]hirty-two states have passed laws establishing address confidentiality programs to help domestic violence victims who need to relocate and keep their location confidential." Rebecca E. Shiemke, *Domestic Violence: Legal Remedies in Other States*, Mich. Bar J., Sept. 2011, at 37, *available at* http://www.michbar.org/journal/pdf/pdf4article1908.pdf. At least thirteen States also offer confidential voter registration. Nat'l Coalition Against Domestic Violence, *supra*, at 1.

States also facilitate concealment for domestic violence victims and their children in other ways. For example, the District of Columbia's Parental Kidnapping Prevention Act specifically excludes from the crime of parental kidnapping the flight and concealment taken to protect a child or parent from "imminent physical harm." D.C. Code § 16-1023(a). Ordinarily, that Act prohibits "intentionally conceal[ing] a child from the child's other parent." *Id.* § 16-1022(a). Michigan's Child Custody Act similarly excludes "[a] custodial parent's temporary residence with the child in a domestic violence shelter" from the category of "evidence of the custodial parent's intent to retain or conceal the child from the other parent." Mich. Comp. Laws § 722.27a(6)(h). This is significant, as the statute instructs courts to consider efforts to detain and conceal a child in making certain custody determinations. *Ibid.* And Maryland relieves a parent from notifying a child's other parent about a

proposed relocation "[o]n a showing that notice would expose the child or either party to abuse." Md. Code Ann., Fam. Law § 9-106(b).

Finally, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) also recognizes that child abduction accompanying flight and concealment from domestic violence is distinct from other parental abduction. The UCCJEA generally requires a state court to decline jurisdiction over custody matters where the parent invoking the court's jurisdiction "has engaged in unjustifiable conduct." UCCJEA § 208(a) (1997), *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf. In the commentary, the UCCJEA identifies "secreting" a child across state lines as "reprehensible" conduct ordinarily triggering a refusal of jurisdiction. UCCJEA § 208 cmt. But in describing this conduct, the UCCJEA distinguishes removal and concealment to escape domestic violence. *Ibid.* The commentary explains that jurisdiction may be appropriate where "a parent flees with a child to escape domestic violence." *Ibid.* To date, forty-nine States and the District of Columbia have enacted the UCCJEA. *See* Uniform Law Comm'n, Child Custody Jurisdiction and Enforcement Act, http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (last visited Oct. 29, 2013).

B. Equitably Tolling The Well-Settled Defense Is Inconsistent With The Convention's Emphasis On Children's Needs

1. The Hague Convention's terms and drafting history demonstrate that equitable tolling is inappropriate

Equitable tolling of the one-year timeframe for considering whether a child is well-settled is inconsistent with the Hague Convention's express focus on *children's* needs. The Convention unambiguously proclaims: "[T]he interests of children are of paramount importance in matters relating to their custody." Hague Convention, pmbl. The Convention's official history records that it was "inspired by the desire to protect children and should be based upon an interpretation of their true interests." Elisa Pérez-Vera, *Explanatory Report*, *in* 3 Actes et Documents, Quatorzième Session 426, 431 ¶ 24 (1982) [hereinafter Actes et Documents]. As this Court has recognized, "the Executive Branch considers the Perez-Vera Report 'the "official history"' for the Convention and 'a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.'" *Abbott*, 130 S. Ct. at 1998 n.1 (quoting Legal Analysis of Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986)).

It is well recognized that stability is crucial for children's well-being. *See* Lindhorst & Edleson, *supra*, at 109. The Hague Convention recognizes the

importance of stability for children in two complementary ways. First, the Convention's return remedy is designed to dissuade parents—under ordinary circumstances—from abducting children across international borders. Second, in Article 12's well-settled defense, the Convention recognizes that, even where such abduction has occurred, there comes a time when a child's current stability should not be sacrificed in the interest of fairness to the left-behind parent by returning a child merely for the purpose of custody proceedings. Hague Convention, art. 12. The well-settled defense "is about ensuring the child's interest in stability is considered in the process of adjudicating his or her return." Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 442 (2010) [hereinafter Weiner, *Uprooting Children*]. And "the purpose of the one-year deadline was to ensure that children were not hastily uprooted once they were settled," *id.* at 431, particularly given that the child might be uprooted again depending on the outcome of the custody adjudication. In other words, the "sole touchstone" of the Hague Convention is not deterrence of abduction; it is child well-being. *Id.* at 475.

The drafters of the Hague Convention deliberately excluded "concealment" from the determination of whether the well-settled defense may be considered. Initially, the draft Convention proposed two time periods after which the well-settled defense might be applicable—allowing it after six months if no

concealment were involved and after one year if the taking parent had concealed the child's location. *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, *in* 3 Actes et Documents, *supra*, 166, 168. Even this proposal imposed a strict one-year outer limit on automatic returns because "the psychological confusion a child may experience following such a removal could reappear if a restitution order were adopted after a certain time had elapsed." Elisa Pérez-Vera, *Report of the Special Commission*, *in* 3 Actes et Documents, *supra*, at 172, 177.

Ultimately, the drafters settled on a single timeframe for all cases: the one-year timeframe contained in Article 12. The official history of the Convention reports that the single one-year timeframe was "a substantial improvement" "since the inherent difficulty in having to prove" concealment and related factors "was eliminated." Elisa Pérez-Vera, *Explanatory Report*, *supra*, at 459 ¶ 108. In short, the drafters, and the final Convention, deliberately and explicitly rejected concealment as an exception to the one-year timeframe for the well-settled defense. Petitioner's plea here runs directly afoul of that intent.

Stability for children, not deference to parents' "rights," drives both the Convention as a whole and the Article 12 well-settled defense. Equitable tolling would re-inject the very factors specifically considered and rejected at the time the Convention was adopted.

A Hague court will always be permitted to weigh concealment when determining whether a child is well-settled; but equitable tolling would mean that courts would not even consider the child's interest in remaining well-settled before ordering return.

2. *Equitable tolling is particularly inappropriate and destructive for children when a parent has hidden for safety*

a. Allowing equitable tolling of the bright line one-year rule would be especially harmful in cases involving domestic or other family violence. Violence in the family profoundly undermines a child's sense of security. "[D]omestic violence can create a sense of chaos in children's home environments, as they feel unable to predict what will happen at any given moment." Bancroft, Silverman & Ritchie, *supra*, at 129. Moreover, as set forth above, children exposed to domestic violence or who are victims of violence themselves often suffer serious physical, emotional, developmental, and behavioral setbacks. *See supra* Section A.1.b; *see also* Bancroft, Silverman & Ritchie, *supra*, at 47 (summarizing research data regarding "emotional, behavioral, and learning problems, increased likelihood to suffer other forms of abuse, and high likelihood to witness the violence" and observing that "[s]tudies from abroad of children exposed to domestic violence have reached similar findings").

A child's removal from an abusive parent is essential to re-establishing the child's sense of security.

"The establishment of both the actuality and the sensation of safety is a first and indispensable step toward any process of emotional healing from trauma * * * ." Bancroft, Silverman & Ritchie, *supra*, at 129. Children often show signs of recovery once they are separated from their abusive parent. George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, *in* Children Exposed to Marital Violence 289, 326 (George W. Holden et al. eds., 1998). Indeed, signs of recovery can emerge as early as six months after removal from an abusive parent. *Ibid.* Bancroft and colleagues have identified "structure, limits, and predictability" as one of six elements "critical to the creation of a healing environment for children of battered women following" separation from an abusive parent. Bancroft, Silverman & Ritchie, *supra*, at 129. However, the lack of definite security and safety, for both children and their caretaking parent, can profoundly defeat healing from the trauma of domestic violence. *Id.* at 128-129.

This case demonstrates precisely these patterns of trauma and recovery. Prior to her removal, this pre-school-aged child suffered from emotional and behavioral problems commonly associated with trauma, such as refusing to speak. *In re Lozano*, 809 F. Supp. 2d at 207. The therapist treating the child in the United States observed additional problems. She testified that the child "would wet herself, was

hypervigilant, and had a very heightened startle response." *Id.* at 212.[7]

Within six months of her arrival in the United States, however, both the child's circumstances and her well-being were considerably changed. The therapist reported that the child "has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy." *Ibid.* The therapist described the child as "completely different." *Ibid.*

b. Permitting equitable tolling to preclude the well-settled defense also would make the circumstances of domestic violence victims and their children more perilous.

Facilitating abusive parents' ability to demand children's return would provide yet another tool by which abusers can control their victims. Many batterers turn to what has been termed "litigation abuse" once their victims are no longer physically

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[7] Montoya Alvarez also testified that, after leaving Lozano, "the child pointed to her genital area and said that [Lozano] had touched her there." *In re Lozano*, 809 F. Supp. 2d at 208. While the district court did not reach this allegation, research shows that adult domestic violence is correlated with child sexual abuse. That is, men who batter their wives are more likely to sexually abuse their children. "[E]xposure to batterers is among the strongest indicators of risk of incest victimization." Bancroft, Silverman & Ritchie, *supra*, at 108 (reviewing all extant research).

available. Susan L. Miller & Nicole L. Smolter, *"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011) (describing abusers' use of protection orders against their victims). In particular, batterers often pursue custody litigation to punish the victim for leaving. *See* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. Soc. Just. 1053, 1065 (2011) ("Abusers will often seek custody simply to harass the survivor, not out of a genuine desire to care for the children. * * * [C]hildren simply become another weapon that batterers can use to further torture their adult victims."); Bancroft, Silverman & Ritchie, *supra*, at 123-162 (describing batterers' pursuit of child custody and visitation litigation as "impeding recovery" by increasing "turmoil and division within families" and mothers' traumatic symptoms); Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. Kan. L. Rev. 433, 450-451 (1998) (examining relocation restrictions in custody disputes and demonstrating that abusers use such restrictions to control their abused spouses).

This pattern also emerges in Hague Convention cases. "[L]eft-behind parents have been known to use the 'free' Hague remedy solely for the purpose of harassing and controlling their victims." Weiner, *Half-Truths*, *supra*, at 297; *see* Marilyn Freeman, International Child Abduction: The Effects 39 (2006) (reporting that several taking parents "expressed the

view that the left-behind parent was simply playing 'a trump card' which had been provided by the Hague Convention but with no desire or intention of daily, or even frequent, involvement with the child on return"). Equitable tolling would allow abusers to exploit the very consequences of their own wrongful acts by penalizing victims and children for fleeing and concealing their whereabouts out of concern for safety.

Holding that equitable tolling does not apply would not inappropriately "reward" abducting parents for wrongful conduct. *Contra* Pet'r Br. 34. Rather, denying equitable tolling is necessary to fulfill the Convention's priority of protecting *children's*, not parents', interests and needs. And denying equitable tolling simply would leave a Hague court to determine whether the child is now well-settled. It would not require any determination about which parent should have primary custody of the child.

C. The Court Should Clarify That Concealment May Only Inform The Factual Determination Of Whether A Child Is Well-Settled

This Court should not reward abusers who drive their partners to flee and hide, and it should not increase the upheaval of children who have endured both abusive parents and flight. That means that the Court should not permit those left-behind parents to preclude consideration of whether their children are

now well-settled. Holding that equitable tolling applies to the well-settled defense would be just such a reward. Not all concealment is the same, and this Court should eschew categorical consideration of concealment.

Instead, focusing on the Hague Convention's purpose of protecting children's best interests, the Court should hold that concealment may be considered only as part of a Hague court's factual determination of whether a child is well-settled. Once the one-year threshold is met, and the child is well-settled, courts should grant the well-settled defense.[8]

Considering concealment as part of assessing whether a child is well-settled would allow a court to find that concealment did or did not play a significant role in whether a child has become settled in a new home. On the one hand, "[a] child who lives a life of deception may never acquire the sort of connections or regularity that is the basis of being 'settled.'"

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[8] Courts would, of course, continue to retain discretion to return the child pursuant to domestic laws, consistent with Article 18. *See* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,507-10,508 (Mar. 26, 1986) ("Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying other laws and procedures conducive to that end."). Article 18 states that the Hague Convention does "not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, art. 18.

Weiner, *Uprooting Children*, *supra*, at 478. Conversely, concealment sometimes may have very little negative impact on a child. For instance, a concealed child may have lived in the same home and attended the same schools since arriving in the new country. *See id.* at 417-418 nn. 27-32 (collecting cases); *cf. In re Lozano*, 809 F. Supp. 2d at 211. Indeed, the concealed child's sense of stability may be a direct result of concealment that enables the child and caregiver to be safe and secure from the abuser.

Courts need not resort to equitable principles to account for these scenarios. Rather, the assessment of whether a child is well-settled will include factors to which concealment may be relevant. For instance, courts have described the well-settled inquiry as one that considers "any relevant factor informative of the child's connection with his or her living environment." *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 387 (D.N.J. 2005).

This result would not require Hague courts to engage in custody determinations or other assessments beyond the scope of their jurisdiction. Courts would instead consider concealment and its effects as part of assessing whether a child is well-settled. This is an assessment courts are instructed to make whenever the well-settled defense is invoked. In a subsequent proceeding, a domestic relations court, hearing all of the evidence, could then adjudicate who should have primary custody of the child and where.

Moreover, this result would allow courts to differentiate between concealment that can contribute to a child's being well-settled, as in the domestic violence context, and other forms of concealment that are destabilizing, such as abduction and concealment by an abusive or indifferent parent. In contrast, equitable tolling removes the protection for children's stability provided by the one-year provision, prevents an inquiry into the child's actual stability, and thereby runs roughshod over children's best interests and needs.[9]

Considering concealment without equitable tolling also would accord with the approaches adopted by several of our treaty partners. Courts in Canada, England, Hong Kong, and New Zealand have rejected equitable tolling of the one-year timeframe before the well-settled defense becomes available. *See Kubera v. Kubera*, [2010] B.C.C.A. 118 (B.C.); *Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.); *A.C. v. P.C.*, [2005] H.K.C. 839 (H.K.); *H.J. v. Secretary for Justice*, [2006] NZFLR 1005 (Court of Appeal), *aff'd*, *Secretary for Justice (New Zealand Central Authority) v. H.J.*, [2007] 2 NZLR 289

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[9] Should the Court conclude that the availability of the well-settled defense may be equitably tolled, it must give significant weight to a history of abuse in determining whether tolling is equitable in an individual case. In particular, as set forth above, flight and concealment for safety would indicate that the equities favor the protective parent over the dangerous one, as well as making "concealment" a benign rather than negative action.

(Supreme Court) (N.Z.); *see generally Yaman v. Yaman*, Nos. 13-1240, 13-1285, ___ F.3d ___, 2013 WL 4827587, at *11 (1st Cir. Sept. 11, 2013) (collecting cases). These decisions are "entitled to considerable weight." *Abbott*, 130 S. Ct. at 1993 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons and those stated in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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OCTOBER 29, 2013

APPENDIX

APPENDIX

Interest of the Amici Curiae

The following organizations respectfully submit this brief as amici curiae in support of respondent and urge the Court to affirm the decision below.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has previously coauthored amicus briefs to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez*; *Davis v. Washington*; *Hammon v. Indiana*; *Giles v. California*; and *United States v. Hayes*. DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **Battered Women's Justice Project—Domestic Abuse Intervention Programs, Inc., Duluth, MN (BWJP)** is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel,

policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of intimate partner violence on women and children and to fashion safe outcomes that hold batterers accountable. The BWJP respectfully requests the U.S. Supreme Court to support the position of Ms. Lozano and recognize the vital safety needs of battered women who must flee across national borders with their children in order to escape violence.

Family Violence Appellate Project (FVAP) is a nonprofit organization founded by members of the University of California, Berkeley School of Law community to ensure, through the appellate legal system, the safety and well-being of domestic violence

survivors and their children. The goal of FVAP is to aid in creating a body of precedent that will help protect families across California. To that end, FVAP provides direct appellate representation for survivors of domestic violence in collaboration with pro bono attorneys, and offers training to domestic violence attorneys and advocates on issues pertinent to domestic violence appeals. In addition, FVAP monitors litigation and identifies those cases that have the potential to impact the interests of domestic violence survivors and their children in California. This is one of those cases.

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women, http://www.legalmomentum.org. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. For example, Legal Momentum was one of the leading advocates for the landmark Violence Against Women Act and its subsequent reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum has a particular interest in ensuring that the judicial system adequately protects the rights of victims of sexual and domestic violence and their children. Its National Judicial Education Program (NJEP) created a web course titled Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases (free at www.njep-ipsacourse.org). NJEP's Director, Lynn Hecht

Schafran, is the author of two articles and a book chapter drawn from this web course, *Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence*, Judicature, Jan.-Feb. 2010, at 161, and *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases—A Free Resource for the DV Community*, Domestic Violence Rep., Apr.-May 2012, at 51, *reprinted in* 5 Fam. & Intimate Partner Violence Q. 7 (2012), and a chapter titled *Intimate Partner Sexual Violence and the Courts*, *in* Intimate Partner Sexual Violence: A Multidisciplinary Guide to Improving Services and Support for Survivors of Rape and Abuse (Louise McOrmond-Plummer, Patricia Easteal & Jennifer Y. Levy-Peck, eds. 2013). Legal Momentum has written or signed on to amicus briefs in cases dealing with the Hague Convention on the Civil Aspects of International Child Abduction before the Second Circuit Court of Appeals and the United States Supreme Court.

Tahirih Justice Center is a national organization based in the Washington, D.C. area with additional offices in Houston, Texas and Baltimore, Maryland. Tahirih is a non-profit organization dedicated to assisting immigrant survivors of gender-based violence. Tahirih has assisted over 14,000 women and children since opening in 1997, providing immigration, family law, and case management services.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-820

SEP - 5 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

MANUEL JOSE LOZANO,
Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS (IAML) AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

The Hague Convention on Civil Aspects of International Child Abduction (the "Convention"), which the United States implemented by enacting the International Child Abduction Remedies Act (ICARA), provides in Article 12 that the courts of a requested state must order the return of a child who has been wrongfully removed or retained where a period of less than one year has elapsed from the date of the wrongful act. When return proceedings are commenced after the expiration of the one year period, Article 12 provides that the courts shall also order the return of the child, "unless it is demonstrated that the child is now settled in its new environment". Where a child has been unlawfully removed or retained and concealed from the left behind parent in a country other than the child's habitual residence, does the implementation of the Convention's declared goals require that equitable tolling be applied for the period during which the child was concealed?

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STATEMENT OF FACTS

The International Academy of Matrimonial Lawyers (IAML)[1] adopts the facts as they are stated in the Petitioner's brief.

INTEREST OF THE IAML

The IAML was formed in 1986 to improve the practice of law and the administration of justice in the area of divorce and family law throughout the world. The IAML currently has some 620 "Fellows" in 45 countries, each of whom is recognized by the bench and bar in his or her country as an experienced and skilled family law lawyer.[2] It is a worldwide association of practicing lawyers who are experienced and skilled family law specialists in their respective countries.

IAML has made presentations in the US and in other Fellows' States in relation to legal reforms. The IAML has sent its representatives to participate in relevant international conferences, often as non-governmental experts, including the six Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction(hereinafter; the Convention). Its Fellows have also written and

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[1] Pursuant to Supreme Court Rule 37.6 counsel for the amici certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the amici has made a monetary contribution to the preparation or submission of this brief. The parties' consents have been filed.

[2] The IAML website, www.iaml.org, contains, among other items, a listing of its Fellows.

lectured widely on the Convention and related topics, such as proceedings to obtain court approved relocation of children to another country.

IAML's interest in the instant case relates to its concern that the implementation of the Convention, which has significantly reduced the harmful effects of international child abduction, will be severely undermined if the judgment of the Second Circuit in this matter is affirmed. Many Convention cases are brought to court in the signatory States by IAML Fellows. The IAML, therefore, has a strong professional interest in preserving the deterrent effect of the Convention and ensuring the prompt return of wrongfully removed or retained children to their habitual residence.

The IAML is acting pro bono in submitting this brief.

SUMMARY OF ARGUMENT

The purpose of the Convention is to return a child who has been wrongfully removed or retained to its country of habitual residence as swiftly as possible. The Convention does not permit the litigation of custody matters within its parameters. It is an instrument to determine the appropriate forum to litigate matters of custody and the best interests of the child. Determinations of legal and physical custody,

parenting time, and child support are intentionally beyond the scope of the Convention.[3]

Article 6 of the Convention establishes a system of Central Authorities in each contracting State. Each Central Authority is charged with carrying out the duties imposed on the states and their political subdivisions in order to implement the Convention. Among those duties are the obligation to discover the whereabouts of a child who has been wrongfully removed or retained; to provide information of a general character as to the law of the their State in connection with the application of the Convention; and to initiate or facilitate the judicial or administrative proceedings needed to consider the return of the child.

Article 11 of the Convention provides that if the judicial or administrative body has not reached a decision within 6 weeks from the date of the commencement of the proceedings, the Central Authority of the requesting State shall have the right to request a statement of the reasons for the delay from the requested State. Some contracting States, in its implementing legislation, mandate their courts to decide such cases within the six week period, (See for example, Civil Law Rules of Procedure of 1984-5744, Regulation 295 (13)a, Israel). The Convention does not define what precisely constitutes the commencement of the proceedings. It avoids the term "filing of action",

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[3] When ratification of the Convention was being considered by the U.S. Senate and implementing legislation was being considered by the U.S. Congress, the Federal Court made it clear it did not want any such legislation to permit parties to litigate their family law issues in the U.S. District Courts.

thus leaving it to the interpretation of the courts in each jurisdiction.

The courts in most jurisdictions have interpreted "commencement of proceedings" as filing an action in a court. However, a minority of courts have held that filing a petition with the Central Authority constitutes the commencement of proceedings. Some of the minority view jurisdictions, such as California and Australia, commence the legal action on behalf of the petitioner. Thus, once a petition has been filed with the Central Authority in those jurisdictions, the left behind parent has commenced proceedings to the extent which he/she can.

The first paragraph of Article 12 provides that when a period of less than one year has elapsed from the date of the wrongful removal or retention at the time of the commencement of the proceedings, the authority concerned shall order the return of the child forthwith, barring the proof of a recognized defense. Where the proceedings have been commenced after the expiration of the one year period, the authorities shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment. The significance of the one year period thus has enormous consequences on the nature of the proceeding and its likely outcome. Determining whether the child has acclimated to its new surroundings necessarily entails precisely the kind of inquiry which Convention proceedings are not meant to undertake; an evaluation of the best interests of the child. While the one year period does not constitute a bar on commencing an action, it does fundamentally change the scope of the proceedings, significantly altering their nature, length

of time and reduces the probability that a return will be ordered. Therefore, the argument that the one year period is not a statute of limitations is thus wholly unresponsive to the consequences of Article 12. Since Article 12 has been treated as a statute of limitations, equitable tolling should apply as it would to any Federal law containing a statute of limitations.

If by concealing the location of the wrongfully removed or retained child, the abducting parent succeeds in preventing the timely commencement of a proceeding, they are given an enormous advantage in an action for return of the child. If the time during which the abducted child is concealed is not tolled, the purpose of the Convention is severely undermined. Not only would the deterrent factor be vitiated, it would in fact encourage parents who contemplate abduction to also conceal the child in order to insure a successful defense to a return petition. Thus, the failure to implement a tolling of the one year period would be the equivalent of telling the abducting parent that their unlawful actions will likely be successful if they commit yet another wrongful and heinous act: concealment of the child.

The consequences of invoking Article 12 relate only to the date proceedings are commenced. There are no legal consequences where the proceedings do not conclude within a year. Thus, when the left behind parent has acted in a timely fashion, but the court, for no reason which is attributable to the petitioner, does not render a judgment within a year, as unfortunately is often the case, there is no invocation of the settled into its environment test. The courts focus is not a principled belief that after a certain length of time,

broader factors should be weighed before making a return order. Rather the emphasis is on the timely action of the left behind parent. Courts do not permit the abducting parent who deliberately delays proceedings for more than a year to invoke the settled into the new environment defense. Why then, should the abducting parent be able to invoke that defense by preventing the left behind parent from discovering the child's whereabouts?

The IAML believes that the destructive consequences of child abduction, which is a form of child abuse, are compounded by not tolling the period during which the whereabouts of the child are unknown. A reasonable solution can be adopted from the more recent 1996 Hague Convention on Jurisdiction and Protection of Children (Child Protection Convention) which provides a rational and simple formula in establishing jurisdiction in child custody disputes. Article 7(b) of the Child Protection Convention provides that in the case of wrongful removal or retention, jurisdiction passes to the new State where the child resided in that new state for at least one year after the left behind parent has or should have had knowledge of the whereabouts of the child and no request was timely filed and the child is now settled in the new State.

A further simplification of this issue can be made by adopting the position that where the child's whereabouts are unknown, the filing of an application with the Central Authority of the child's habitual residence will be considered the commencement of proceedings for purposes of Article 12. This will enable the left behind parent to take action within the

specified period if he/she wishes to bring about the return of the child and it will simultaneously discourage the abducting parent to seek an advantage by concealing the child.

ARGUMENT

I. THE ONE YEAR FILING PERIOD OF ARTICLE 12 OF THE CONVENTION IS EQUIVALENT TO A STATUTE OF LIMITATIONS.

Article 12 provides that the child may be returned even if the petition is filed after one year, *unless* (emphasis not in original), the settled in its new environment defense is established. Unlike the provisions of Article 13b of the Convention, there is no express discretion to order a return if the child is now settled in its new environment. The discretion to return provision precedes the settled in its new environment exception in the article. Thus, there is no express discretion to order the return if the child is now settled in its new environment where the petition was filed after the one year period. While most courts have inferred a discretion to return, there is no clear mandate to do so in the Convention. See *Re M. (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, House of Lords, minority opinion of Lord Rodger. Even where such discretion is inferred, the one year period severely limits the left behind parent's chances of succeeding in the petition for return and often becomes a *de facto* statute of limitations.

The opinion of the Second Circuit in this matter, reported at 697 F.3d 41, holds that "Unlike a statute of

limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering the child to be returned to her country of habitual residency", (page 14 of the judgment). It is not the court's authority to order a return after the one year period which should considered. What must be considered is the likelihood of successful implementation of the substantive right of return when a well settled defense is permitted.

In addition to the argument that the Convention does not provide the courts with a clear mandate of discretion, in practice, the possibility that an order of return will be made in such cases is significantly diminished. As stated in the petition for certiorari, only two courts in published decisions have ever ordered the return of a child after making a well-settled finding. See p. 22 of the Petition for Writ of Certiorari. The courts in other signatory States have taken a similar approach. In addition to the above cited Re M., courts in member States routinely refuse the return of unlawfully removed children when the petition is filed more than one year after the removal or unlawful retention. In practice, the failure to toll the one year period is most often outcome determinative.

By way of one example, the Appellate Court of Paris, France denied a return where a petition was filed sixteen months after an unlawful removal. The court held that in a conflict between the Convention's purpose and the greater interest of the child, the Convention's purpose takes second place. See CA Paris,

8 Aout 2008, Nos de RG 08/05791 et 08/07826.[4] The Supreme Court of Ireland issued a judgment not to return where the petition was filed by the public prosecutor 20 months after the unlawful removal but within one year after discovery of the child's location. Although the removal was unlawful, the child had become settled in its new environment. *P.* v. *B.* (No. 2), (Child Abduction: Delay)[1999] 4 IR 185.[5] The Supreme Court of New Zealand ruled in a case where the children were unilaterally removed from Australia by the mother in February, 2002. The father was notified of the children's location in May, 2003 and commenced return proceedings in December of that year. The Supreme Court upheld the lower court's refusal to order their return, accepting the argument that they were now settled in their new environment. *Secretary for Justice (NZCA)* v. *H.J.* [2007] 2 NZLR 289.[6] In a case where a child was abducted to England from the U.S., the parents reached an agreement in 1999 to return the child to its habitual residence. However, the abducting mother then removed the child, who was only located in 2003. The court refused the petition for return based on its finding that the child was settled in her new environment. The court noted that her emotional life was not complete, being out of contact with her father, but that did not mean that she was not settled in her new environment. *Re C*

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[4] Case cited at www.incadat.com.

[5] Case cited at www.incadat.com.

[6] Case cited at www.incadat.com.

(Abduction Settlement) [2005] 1 FLR 938.[7] Although it is beyond the scope of the Convention, one cannot completely ignore the consequences of the failure to apply equitable tolling for the future relationship between the left behind parent and the child. The post-judgment prospects in a case such as Re C for the left behind parent to re-establish contact with the child are very slim. An abducting parent, who is permitted to conceal the child without suffering any legal consequences, will have no incentive to abide by any court ordered visitation schedule. As noted by the U.S. Supreme Court, "Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature". *Abbott* v. *Abbott* , 130 S.Ct. 1983, 1996 (2010).

While courts in other signatory states have not adopted equitable tolling, some have fashioned other responses to concealment, such as a heightened burden of proof where the settled in defense is claimed. See for example, *Cannon* v. *Cannon*, [2005] 1 W.L.R. 32, (England). In the United States, the overwhelming majority of federal appellate and district courts have applied equitable tolling in cases where the abducting parent concealed the child's location, as in the present case. See, e.g. *Furness* v. *Reeves*, 362 F.3d 702,723(11th Cir. 2004), *Dietz* v. *Dietz*, 349 Fed. Appx. 930, 933 (5th Cir. 2009), *In re B. Del C.S.B.*, 559 F.3d 999, 1014-15 (9th Cir. 2009).

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[7] Case cited at www.incadat.com.

II. THE BRIEF OF THE UNITED STATES

The *amicus curiae* brief submitted by the United States represents a 180 degree reversal of its previous position on equitable tolling prior to the present petition. Petitioner's writ clearly cites the position held by the United States commencing in 1980 until the present case. The United States supported equitable tolling in the 1980 deliberations on drafting of the Convention. In Preliminary Document No. 7 of September, 1980 in Comments of the Governments deliberating the Convention draft, the United States made the following comment on Article 11, which later became Article 12 in the final version of the Convention:

> The United States is perturbed about this article's extremely restrictive time limits. As a practical matter, it may not be possible to locate a child and to bring proceedings in an appropriate court within these limits. This is particularly true in large federated States such as the United States, which also has no requirement for persons to register upon establishing or changing their residence. A *statute of limitations* (emphasis added) of six months from the date of abduction to the institution of legal proceedings, or a maximum of one year in the case of the child's concealment, will cut of many deserving applicants and their children. Rather than deterring abductions this article may benefit those abductors who have the financial means and friends to arrange for life underground, perhaps moving from place to place to avoid

detection. The child in the meantime is subjected to the life of a fugitive.

It has been said that the time limits are necessary because children will be integrated into a new social environment within 6 months to a year, and that it would be contrary to their interests to be returned thereafter. Discussions with mental health professionals in the United States indicate that there is serious doubt about the correctness of such a general assumption. It is recognized that there comes a point in time when it could be harmful to uproot children after an abduction. However, as the Rapporteur points out, it is impossible to come up with an objective criterion concerning the child's integration into a social environment so that any time period adopted 'will always be of an arbitrary nature' (*Report*, paragraph 89).

It is true that possible harm to the child through renewed change of environment after a lengthy stay with the abductor should be considered. But this must be weighed against the Convention's principal objective of deterring kidnappings, which are themselves traumatic experiences for children. In such a weighing process the unproved assumption of harm to children after an absence of six months to one year is clearly outweighed by the necessity to curb abductions. If the time limits of this article remain as written, they may promote rather than deter abductions. The United States urges that at the very least 1-year and 2-year limits be substituted for the present deadlines. (Actes et

documents de la Quartorzieme session, Tome III, Child Abduction, Hague Conference on Private International Law, p. 242, Imprimerie Nationale/La Haye/1982).

In addition to calling for a minimum of a two year limit before the settled in defense can be invoked in cases of concealment, the United States, contrary to its present position, refers to the time limit as a statute of limitation. The United States' brief before this court also fails to explain how a child whose left behind parent has been suddenly and inexplicitly removed from its life, who is often told by the abducting parent that the left behind parent is no longer interested in maintaining contact, or is indoctrinated with fabricated tales of horror from which the child has allegedly been saved, can possibly be well settled in any environment.

In Public Notice 957, Fed. Reg. 1094 of March 26, 1984, the U.S. Department of State made the following point regarding Article 12. "If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations." P. 10509.

III. PERIODS OF ONE YEAR OR MORE DUE TO COURT DELAYS DO NOT INVOKE THE WELL SETTLED DEFENSE.

In a significant number of cases that were filed within the one year period, the final judgment was rendered two or more years after commencing the action. Those delays, whether due to crowded court calendars or the use of delay tactics by the abducting parent, do not constitute grounds to raise the well settled defense.[8] Once the petition is filed in within the one year period, it would be inequitable to negatively impact petitioner's chance of success due to delays beyond his control. It would certainly be an injustice to permit delays caused by the abductor to change the ultimate decision of the court as result of allowing the well settled defense. If that were the case law, delay tactics would be used in every case in order to undermine, if not nullify, the purpose of the Convention.

Concealment of the child is simply another form of delay tactic. As long as the period of concealment is tolled, the purpose of the Convention is preserved and the abducting parent does not profit by this harmful conduct. From the child's perspective, there is no difference whether the time elapsed is due to concealment, delay tactics of the abductor, or overcrowded court calendars. If the time is tolled once

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[8] "It will be noted once again that this time limit does not affect the length of the proceedings in court". Comments of the Canadian Government, Actes et Documents, id. p. 231, under Art. 11.

the petition is filed in a timely manner, than there is no justification for not tolling the period during which a child is concealed. Counsel for these amici know of not one learned article published in leading journals that conclude the settled in defense serves the best interests of children.

A case which illustrates this point, *Lee* v. *Ezra*,[9] was decided by the Supreme Court of Israel. The mother unlawfully removed the child to Israel from Nevada. She did not inform the father where she and the child were located. Several months subsequent to the abduction, the father was able to obtain information which led him to believe that the child was in Israel, where the mother had family members. Although her precise location was unknown, the father was able to commence action as Israel's civil law regulations[10] permit the filing of Convention cases in the Tel Aviv court in such instances. His action was filed five months after the abduction. The Family Court granted substituted service and a default judgment was rendered ten months after the abduction, ordering the return of the child.

The judgment was not executed as the child could not be found. Just over three years subsequent to the judgment, the mother was located during a random police check. After being personally served with the

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[9] David Lee v. Lilly Ezra, Motion for Leave to Appeal (Family Matters) 5690/10, August 10, 2010, Supreme Court of Israel, (English translation and original decision in Hebrew).

[10] Civil Law Rules of Procedure, 1984-5744, Regulations 295(b), 258 (c), Israel.

return order, the mother filed for a stay and for an order to set aside the default judgment. The Family Court granted both motions and a new trial was held. The court made its new decision three months subsequently, 38 months after the abduction. It held that the removal was unlawful but ruled that the commencement of proceedings for purposes of Article 12 was the time of the actual trial and not the date of filing. The court then held that it was entitled to consider whether the child was settled in to his new environment. The court found that the removal was wrongful but return was denied as the court held that the child was now settled in.

The father appealed the decision to the District Court of Tel Aviv sitting as an appellate court. The District Court reversed the trial court, holding that the language of the Convention is clear and that the one year period runs until an action is commenced. In this case, the date on which the father filed his petition with the trial court is determinative. Therefore, the trial court erred in considering the settled in defense. In August of 2010, four and a half years after the abduction, the Supreme Court of Israel affirmed the ruling of the District Court. The child was then returned to the United States by the father, as the mother chose to remain in Israel, despite her allegations of the grave risk of intolerable physical and psychological harm to the child should he be returned. The simple fact that a petition was filed with the court within five months of the abduction, even though the actual trial took place three years subsequent to the abduction and the return occurred over four years later, meant that the settled in argument was not relevant. Certainly, none of the procedural matters are

of concern to the child. Yet due to the fact that the US has no jurisdictional regulation parallel to that of Israel, a US court would consider the settled in argument in the same fact pattern simply because the left behind parent would have no place to file the petition in a timely manner. The results would most likely be completely opposite in the two countries due to the technicality of a filing provision or lack thereof.

The IAML seeks to have the Convention implemented in good faith. It should not be a weapon that a left behind parent can threaten to invoke for an undetermined period in order to gain tactical advantages in negotiating with the other party. In order to counter that possibility while not encouraging the concealment of abducted children, a simple solution is suggested. Whenever the whereabouts of the child is unknown to the left behind parent and the Central Authority of the requesting State is unable to ascertain the child's location, filing an application with the Central Authority should be considered as the commencement of the proceedings for purposes of Article 12. There is nothing in the Convention that contradicts such an interpretation. In fact, as discussed above, some courts have held that the action commences when the application is filed with the Central Authority. If the application is filed within the one year period, then the settled in defense should not be considered. This enables the left behind parent to take action within the specified period while simultaneously discouraging the abducting parent to seek an advantage by concealing the child.

A further solution can be found in the 1996 Hague Convention on Jurisdiction and Protection of Children.

Article 7(b) of that Convention provides that in the case of wrongful removal or retention, jurisdiction passes to the new State if the child resided in that new State for at least one year after the left behind parent has or should have had knowledge of the child's whereabouts and did make a timely request. We believe that the adoption of this principle to the Abduction Convention, along with the solution of filing with the Central Authority as stated above, provides an equitable resolution for the implementation of the well settled defense in cases where the child is concealed.

CONCLUSION

The IAML concludes that equitable tolling must be read into the Convention in cases where the child has been concealed by the abductor. A decision to the contrary would undermine the goals of the Convention and enable its own undoing. Failure to apply tolling not only encourages parents who consider abducting their children to carry out the abduction, it would cause further damage by encouraging those abductors to conceal their child. Consideration of the well settled defense significantly reduces the chances for a return order. It turns the Convention proceedings from a deliberation on the choice of forum to a hearing on the best interests of the child. This is contrary to the goals of the Convention, which are to discourage child abduction and to bring about the swift return of abducted children.

The IAML's proposed solution of tolling the period in the case of a concealed child from the date of filing a petition with the Central Authority or adopting the provisions of Article 7(b) of the 1996 Convention on

Jurisdiction and Protection of Children presents a reasonable and equitable resolution of the issue before this court.

Respectfully submitted,

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APPENDIX

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APPENDIX A

State of Israel

At the Supreme Court

Motion for Leave to Appeal (Family Matters) 5690/10

Before: The Honorable Judge E. Rubinstein
The Honorable Judge N. Hendel
The Honorable Judge U. Fogelman

Petitioner: *A*

Versus

Respondent: *B*

Hearing on a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court dated 8.7.10 in Misc. Family Matters 18359 rendered by Judges I. Stufman, T. Shapira and S. Shohat

Hearing Date: 30 Av 5770 (10.8.10)

On behalf of the Petitioner: Adv. Nehama Zibin
Adv. Bernard Alfasi

On behalf of the Respondent: Adv. Edwin Friedman
Adv. Ela Rudnik

Ruling

Judge N. Hendel

1. Before us is a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court (Misc. Family Matters 18359-05-10, dated 8.7.10), which instructed the return of a abducted child – the son of the Parties, born 3.1.03 – to the United States according to the Hague Convention Law (Return of Abducted Children), 5751-1991 (hereinafter: "the Treaty"). Thus, the District Court accepted the Respondent's appeal on the ruling of the Family Matters Court in Ramat Gan (Family File 34860/06), which had rejected his claim according to the Treaty.

Procedural Background

2. The Respondent is of Chinese origin and a resident of the United States. The Petitioner was born in Israel and has American and Israeli citizenships. The Parties are not married. They met around the year 2002 and their son was born, as aforesaid, about one year afterwards.

   Even though we are dealing with a proceeding administered according to the Treaty, and thus should have been heard urgently, its administration spread over several years. The legal proceedings regarding the child began in 2005, when an order was rendered by the Court in the State of Nevada in the United States, according to which both parents were provided with joint custody over the child. According to this order, the child was to be under

physical custody with the Petitioner and the Respondent was to be provided with visitation rights. About seven months afterwards, on 1.2.06, the mother arrived in Israel with the child without the father's knowledge. After about five months, on 12.7.06, the Respondent submitted to the Family Matters Court a claim for return of his son, pursuant to the Treaty. On 6.12.06, the Family Matters Court ruled in favor of the Respondent in the absence of a statement of defense and appearance by the Petitioner. The ruling was not implemented until 18.1.09. On this date, the Petitioner was located randomly as part of a routine inspection by the traffic police. About a week later, the Petitioner submitted a motion to abolish the ruling, which was accepted. Evidence was heard and an expert was appointed.

The Family Matters Court ruled that the child has been unlawfully removed by the Petitioner. Nevertheless, the Family Matters Court rejected the Respondent's claim, on the basis of the determination that he had settled in his new surroundings. The Respondent emphasized that Article 12 of the Treaty allows for examination of the minor's settlement only if one year elapsed from the date of removal of the minor until commencement of the proceeding. Recall that the claim was submitted several years before then. However, the Court rejected the Respondent's claim and determined that the period of one year should be counted from the date on which actual treatment of the proceeding commenced. Moreover, the Family Matters Court determined that the defense of acquiescence of the parent regarding abduction of

the child, as set forth in Article 13(A) of the Treaty, applied in this case. This was also set forth as to the application of Article 13(B) of the Treaty on this case, regarding psychological damage to the child.

The District Court abolished the ruling of the Family Matters Court, and instead ruled that the Respondent's claim was to be accepted. As to Article 12, it was emphasized that the period of one year should be counted from the date of removal until the claim submission date and not beyond. Thus, the test of settlement per Article 12 of the Treaty could not be applied to the case. Also, it was ruled that the Respondent never acquiesced with the abduction pursuant to Article 13(A) of the Treaty. Finally, it was set forth the according to an expert opinion, there was no basis for the determination that it had been proven that damage would be caused to the minor, pursuant to Article 13(B) of the Treaty, in a manner justifying rejection of the Respondent's claim. The basis for the claim regarding cause of psychological damage was an arrest warrant issued against the Petitioner without her knowledge and the implications of the matter on the child. However, during the hearing at the District Court it was discovered that the arrest warrant had been abolished on 16.4.10.

<u>The Parties' Arguments</u>

3. The Motion for Leave to Appeal was set for a hearing before three judges. The Parties argued in writing and an oral discussion was also administered. As indicated, the Respondent places emphasis on two main arguments: first, the District

Court erred in rejecting the position of the Family Matters Court according to which the period of one year, pursuant to Article 12 of the Treaty, ought to be counted according to the date on which actual treatment of the proceeding began. Second, severe damage may be caused to the minor if the Petitioner traveled to the United States in order to participate in a proceeding to be held there – if the District Court's ruling prevailed. The reason is that there is substantial risk that the Petitioner would be arrested by the police due to the abduction of the Respondent thus requested. The severance caused between the Petitioner and her son if such scenario materialized would impose great hardship on the child. Accordingly, there is basis for the conclusion that the Respondent would involve the authorities in order to bring about the Petitioner's arrest. On the other hand, the Respondent holds that there is no error in the ruling of the District Court and no basis to the argument that he would act in order to bring about the Petitioner's arrest.

Discussion

4. I shall refer to the arguments according to their order. Article 12 of the Treaty sets forth:
Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority,

even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment..."

As we can see, the Treaty allows for examination of the child's settlement in his new surroundings only if one year elapsed from the date of removal until the date of the proceeding commencement. The examination is found between two checkpoints: the removal date and commencement of the proceedings. In our case, the proceeding was initiated at the Family Matters Court on 12.7.06, that is, only five months after the removal date. As aforesaid, the Family Matters Court afforded weight to the fact that "treatment of the claim" had not begun until 2½ years following the date of its submission or three years following the date of the removal (pg. 7 of the ruling of the Family Matters Court). This approach ought to be rejected. The term "commencement of the proceeding" is self-explaining. There is no room to determine that commencement of the proceeding is from the stage at which the case reaches actual treatment. It seems that this is certainly a different stage than "commencement of the proceeding". The interpretation offered by the Family Matters Court has no basis in the rulings of the District Court, this Court or foreign countries that also engage in interpretation of the Treaty. Although terms in the Treaty may not be interpreted according to the interpretation of a similar term in the internal law, it is interesting to refer to Regulation 7A of the Civil

Procedure Regulations, 5744-1984, entitled "Commencement of the Proceeding". Regulation 7A(A) defines the term as follows: "A proceeding at Court shall commence with the submission of a claim". Beyond the fact that the language of the law is clear in the sense that the intension is not, for example, initiation of the evidence proceeding, the purpose of the law is not compatible with the interpretation suggested by the Family Matters Court.

If commencement of the proceeding means actual treatment of the claim, then this may encourage the abducting parent to prolong the proceeding and prevent commencement of actual treatment of the proceeding, so that he may better substantiate an argument according to which the child involved settled better in the environment to which he brought the child since he had stayed there longer. For this reason, the relatively short period of one year was set forth in the Treaty. The result would be that the abducting parent benefited from prolonging the proceeding. As written in Section 108 of the Perez-Vera Report, which constitutes an official interpretation of the Treaty:

> "The article as retained the date of which proceeding were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interest of parties protected by the Convention".
>
> (Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Hague*

Conference on Private International Law, Acts and Documents of the Fourteenth Session (Vol. III, 1980), p. 459).

That is, the aim in setting the date at the commencement of the proceeding and not the rendering of the ruling was to protect the parent worthy of protection according to the Treaty – the parent from which the child was abducted.

The Petitioner's Counsel, Adv. N. Zibin, was aware that a new interpretation for term "commencement of the proceeding" was involved, but noted that the trend today was to interpret the Treaty in a manner compatible with the best interests of the child. My response is that the matter depends on the term that is the subject of the interpretative process. There are terms that naturally require interpretation and cannot be defined by pointing to a certain point on the time axis. So, for instance, regarding interpretation of the term "regular place of residence" of the child. I accept that upon interpretation of this term, there is room to examine the matter from the child's perspective, but there are other possibilities in Court rulings (see, for instance, Family Matters (Beer Sheva) 130/08 *A v. B* (31.8.08), in which different approaches appear as to definition of the term "the child's place of residence"). **However,** "commencement of the proceeding" is not such a term. If the enactor of the Treaty had desired to define the term in the manner proposed, he could have written terms such as "from the date of hearing of the evidence", "from the date of rendering of the ruling" or "from the date of actual treatment of the proceeding". **The Treaty is**

built upon gentle balances in order to fight against the harsh phenomenon of abduction of children from one country to another and there is no room for provision of interpretation to the Treaty that is incompatible with its words and purpose.

5. An additional argument of the Petitioner that came up at the hearing was the concern that upon arrival of the Petitioner at the United States in order to take part in the proceeding that was supposed to be administered there, she may be arrested as a result of application by the Respondent to the authorities. While the arrest warrant issued against the Petitioner was abolished, there was no prevention, so it was argued, from the Respondent turning to the authorities upon the Petitioner's arrival at the United States in order to participate in the trial. In response, the Respondent's Counsel, Adv. E. Friedman, announced that he would be willing to submit a letter on behalf of his client, to be sent to the local district attorney in the US, according to which he was not interested in the Petitioner being arrested as aforesaid. A copy of such letter, dated 10.8.10, addressed to the Deputy Attorney General of the State of Nevada, was recently submitted to us. The letter received is clear and explicitly specifies that the Respondent is not interested and has no intention of effecting the administration of criminal proceedings against the Petitioner. The Respondent also requested that substantial weight be afforded to his position on the matter. It seems that this letter obviates the concern raised by the Petitioner's Counsel regarding the probability for her client's arrest. It is true that the Respondent's

position does not bind the DA in the State of Nevada. However, experience indicates that except for extraordinary cases such as abduction of a child through violence or repeated abductions – the chance that the Petitioner will be arrested is not high. It is certainly not higher than for any parent returning to the country from which the child was abducted in order to participate in the legal proceeding. If we accepted the argument, the result would be that the abducting parent would be entitled to argue that the child ought to be left at the country to which he was taken due to the concern regarding his arrest at the country from which the abduction was performed. Of course, this is not the position of the Court rulings.

A final point that is noteworthy is that there was no room to set forth that the Respondent has acquiesced with abduction of the child after he had been brought to the State of Israel. To the contrary– it seems that the Respondent's actions speak loudly and sharply and indicate that he is acquiescent as to the abduction at all.

6. Therefore, whereas it is agreed that the Petitioner performed abduction towards her son, and the exception appearing in Articles 12-13 of the Treaty do not apply, the District Court was correct in deciding, in practice, to instruct that the trial be held in the United States, while abolishing the ruling of the Family Matters Court.

It shall be noted that the implication of rejection of the Motion is that the last section in the District Court's decision is in effect. According to this

Section, the Family Matters Court must discuss "the arrangements for return of the child to the US, arrangement of the flights, guarantee of child support and housing for the child as pertain to relocation of the minor from Israel to the US", in order to safeguard the child's best interests during the period until the decision by the Court in the US. It may be assumed that the Family Matters Court will act promptly in order to determine the arrangements required in order to transfer the minor to the US. Hopefully, the Parties will understand that their son is common to them and that they have the power to impose hardship on him or, on the other hand, alleviate his hardship, during the upcoming period of relocation to the US. Assumingly, the difference between the two possibilities may be very significant for the child at the junction where he is found.

7. I did not find that the District Court erred in its conclusion. There was no room to affirm the ruling of the Family Matters Court. I would propose to reject the Motion and for the Petitioner to incur the Respondent's expenses at the sum of NIS30,000 as of today.

Judge

Judge E. Rubinstein:

A. I agree with the opinion of my colleague, Judge Hendel. Hague Treaty cases, certainly once several years have passed since the abduction, often raise a difficult humane question, since the cost of the situation formed is often paid by the minor that is

the subject of the proceedings and he is essentially the subject of the abducting parent's wrongdoing. In Motion for Leave to Appeal (Family Matters) 2338/09 *A v. B* (unpublished), I had the chance to say:

"Hague Treaty cases naturally represent human tragedies, war between parents, who may be essentially be normative parents, though wish to reside in different countries. The international order at the 'global village' and the simple mobility that is characteristic of the same resulted in the Hague Treaty which aims at ensuring the immediate return of children unlawfully removed to another country (Judge Procaccia in Motion for Leave to Appeal (Family Matters) 672/06 *A v. B* (unpublished), par. 8). As she noted, in such cases the best interests of the child is decisive only 'whereupon its weight prevails over the central purpose of the Treaty'. Each of these cases represents human worlds above which there is the world of the minor that is taken from one place to another."

B. Unfortunately, this is the case here as well: the mother acted unlawfully and as described by my colleague, Judge Hendel, all roads lead to the direction instructed by the District Court, return of the minor. Possibly, the sadness over the minor's relocation was in the conscience of the Family Matters Court, which even treated (according to the expert opinion) the concern of severance of the minor from his mother. We do not believe that this concern regarding severance will materialize, and my colleague referred to the matter of concern

regarding criminal proceedings against the mother and limitation thereof, in light of the father's clear letter of the DA in Nevada. Also, the mother is not estranged to the US, judging by her life history and citizenship, and this is significant for the mother's ability to cope with the return thereto.

C. Matters regarding the paternal capability of the father (who already placed a child in adoption, an issue that must be addressed) may be heard in their proper forum before the Court in the US, which will assumingly adjudicate according to the principle of best interests of the child.

D. In conclusion, I shall express the hope that the Parties will find ways, which may be diverse, for the maintenance of appropriate connection with the father as part of maternal custody, and will allow the minor to grow in a reasonable manner under conditions that are naturally complex, though possible. The father's Counsel affirmed during the hearing, in this respect, the his client was interested in being "an active father in the child's life, to visit him regularly, to have a good and warm connection with him, and without undermining the aspect of the relations between the child and the mother". I do hope so.

E. As aforesaid, I join the opinion of my colleague. I hope and assume that our ruling will be translated to English for the convenience of the Court in the US.

Judge

Judge U. Fogelman:

I agree with the opinion of my colleague, Judge N. Hendel, and the comments of my colleague, Judge E. Rubinstein.

Judge

Decided as aforesaid in Judge N. Hendel's ruling.

Rendered today, 8 Elul 5770 (18.8.10).

Judge Judge Judge

The copy is subject to editing and wording changes. Information Center, tel. 02-6593666; internet site: www.court.gov.il

APPENDIX B

State of Israel

At the Supreme Court

Motion for Leave to Appeal (Family Matters) 5690/10

Before: The Honorable Judge E. Rubinstein
The Honorable Judge N. Hendel
The Honorable Judge U. Fogelman

Petitioner: *A*

Versus

Respondent: *B*

Hearing on a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court dated 8.7.10 in Misc. Family Matters 18359 rendered by Judges I. Stufman, T. Shapira and S. Shohat

Hearing Date: 30 Av 5770 (10.8.10)

ORIGINAL IN HEBREW

App. 16

בבית המשפט העליון

בע"מ 5690/10

בפני	כבוד השופט א' רובינשטיין כבוד השופט ג' הנדל כבוד השופט ע' פוגלמן
המבקשת:	פלונית
	נ ג ד
המשיב:	פלוני

ריון בבקשת רשות ערעור על פסק דינו של בית המשפט המחוזי בתל אביב-יפו מיום 8.7.10 בבר"ש 18359 שניתן על ידי השופטים י' שטופמן, ת' שפירא ואי שיחט

תאריך הישיבה:	ל' באב התשע"ט	(10.08.10)
בשם המבקשת:	עו"ד נעמה בינין עו"ד ברנרד אלפסי	
בשם המשיב:	עו"ד אזהין פרידמן עו"ד אלה רודניק	

פסק-דין

השופט ג' הנדל

1. פתחה בפנינו בקשה רשות ערעור על פסק דינו של בית המשפט המחוזי בתל אביב-יפו (בבר"ש 18359-05-10 מיום 8.7.10) אשר הורה על החזרה ילד חטוף - הוא בנם של הצדדים ויליד 3.10.03 - לארצות הברית על פי חיק אבנה האג (ההוורה ילדים חטופים), התשנ"א-1991 (להלן: "האמנה"). בכך, בית המשפט המחוזי קיבל את ערעור המשיב על פסק דינו של בית המשפט לעניני משפחה בחיפה בן (תבי"ש 34860/06) אשר דיחה את תביעתו לפי האבנה.

הרקע הדיוני

2. המשיב הינו בנוצא פיני ותושב ארצות הברית. המבקשת היוה ילידת ישראל בעלת אזרחות אמריקאית וישראלית. הצדדים אינם נשואים. הם נפגשו בסמוך לשנת 2002 ובנם נולד באמור כשנה לאחר מכן.

על אף שעמדנו בהליך המתנהל לפי האמנה, ועל כן אמור להישמע ברחיפות, ניהולו הסתרע על פני מספר שנים. ההליכים המשפטיים בעניינו של הילד החלו בשנת 2005 כאשר ניתן צו על ידי בית המשפט בפרינה נבאדה שבארצות הברית לפיו הוענקה לשני ההורים משמורת משותפת על הילד. על פי צו זה, הילד יימצא במשמורת פיזית אצל המבקשת והמשיב יזכה בזכויות ביקור. בשבעה חודשים לאחר מכן, ביום 1.2.06, הגיעה האם לישראל עם הילד ללא ידיעת האב. בחלוף כחמישה חודשים ובתאריך 12.7.06, הגיש המשיב לבית המשפט לענייני משפחה תביעה להשבת בנו מכוח האמנה. בתאריך 6.12.06 ביה המשפט לענייני משפחה נתן פסק דין לשובת המשיב בהיעדר כתב הגנה והוסיף כסעם המבקשת פסק הדין לא בוצע עד לתאריך 18.1.09. במועד זה, אותרה המבקשת באקראי במסגרת בדיקה שגרתית של משטרת התנועה. כשבוע לאחר מכן, הגישה המבקשת בקשה לביטול פסק הדין, אשר התקבלה. נשמעו הוכחות וכונה כומתה.

בית המשפט לענייני משפחה קבע כי הילד הוחזק על ידי המבקשת שלא כדין. חרף האמור, בית המשפט לענייני משפחה דחה את תביעת המשיב. ואת, על יסוד הקביעה שהוא התחלב כסביבתו החדשה. המשיב הדגיש כי סעיף 12 לאמנה מאפשר בדיקת השתלבותו של הקטין רק אם חלפה שנה ממועד הוחזק הקטין ועד תחילת ההליך. כזכור, התביעה הוגשה מספר שנים לאחר מכן. ברם, בית משפט דחה את טענת המשיב בקובעו כי יש למנות את תקופת השנה מן המועד בו החל בירור ההליך לגופו. למצלה מן הצורך, בית המשפט לענייני משפחה קבע כי הגנת ההסתלמה של ההורה עם חסיפת הילד מבנו הקבועה בסעיף 13(א) ריישא לאמנה חלה במקרה דנא. וכן גם נקבע לגבי תחולתו של סעיף 13(ב) ריישא לאמנה על המקרה הדן בדבר נזק פסיכולוגי לילד.

בית המשפט המחוזי ביטל את פסק דינו של בית המשפט לענייני משפחה והחזיר את קבע כי דין תביעת המשיב - להתקבל. באשר לסעיף 12, הודגש כי יש לפנות את הקושה השנה ממועד ההרחקה ועד למועד הגשת התביעה, ולא העבר לכך. על כן, לא ניתן להחיל על המקרה את כבחן ההשתלבות שבסעיף 12 לאמנה. כמו כן,

App. 18

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נפסק כי הסיפא לא חלים עם החכירה התשלום לכלול 13(א) לאמנה. אחרון זכה כי על זו חוית דעת כותבה לא קם בסיס לקביעה שהוכח כי יועצ נוק לקטן כהסכמתו בסעיף 13(ב) לאמנה באופן שבצורך את יחידת תביעת הכסיס. הבסיס לתעוה לו־יכפ נוי אלימולוזי יסוק בזו רואר שהעמא נגד הכבקשה שלא בידיעה השלטה הנעיין על הילד. בוסף, נבהלי הדיין בפני כית הכסכם הסחוי נהבריי כי זו הכאכר בוסל ביום 16.4.10.

טענות הצדדים

5. הבקשה לפני עתה עוסקת בשאלה האם הילד יוחזר לארצות הברית, כפי שביקשה האם, או שיישאר בישראל, כפי שביקש האב. לטענת האם, הילד הועבר לישראל שלא כדין, בניגוד לסעיף 12 לאמנה. לטענתה, הילד התגורר בארצות הברית מלידתו ועד להעברתו לישראל, ומשכך מקום מגוריו הרגיל הוא בארצות הברית. האם הוסיפה כי היא מעולם לא נתנה הסכמה להעברת הילד לישראל, וכי הוא הועבר לישראל ללא ידיעתה. לפיכך, לטענת האם, יש להורות על החזרת הילד לארצות הברית.

6. האב התנגד לבקשה. לטענתו, הילד הועבר לישראל בהסכמת האם, ולאחר שהות משותפת בישראל החליטו ההורים כי הילד יישאר בישראל. האב הוסיף כי הילד הסתגל היטב לחיים בישראל, וכי החזרתו לארצות הברית תגרום לו נזק נפשי חמור. לטענת האב, יש לדחות את הבקשה גם מן הטעם שהאם נתנה את הסכמתה להעברת הילד לישראל, ולכל הפחות השתהתה בהגשת הבקשה באופן המצדיק את דחייתה.

דיון

7. אתייחס למענה לפי סדרן. סעיף 12 לאמנה קובע:

> "ילד, אשר לא כדין, העתק או הוחזר כאמור בסעיף 3, וביום פתיחת ההליכים בפני הרשות השיפוטית או המינהלית של המדינה המחקבות שבה נמצא הילד חלפה תקופה של פחות משנה מיאריך התאריך על ידי ההסמכה, שלא כדין, תהווה הרשות הנוגעת בידי להורות את הילו לאלתר. הרשות השיפוטית או המינהלית תהיה רשאית להורות את הילד, אף אם החלו ההליכים לאחר תום התקופה של שנה אחת האמורה בפסקה הקודמת, וזלת אם יוכח כי הילד השתלב כבר בסביבתו החדשה."

App. 19

זיגיע ריזאה ב' ראבנה נכסיה בריקת השרטוטה של הילי גם פכיסה
הרשמה וא בתנאי טיפלה שנה סכיתי דיבראלה יגו לבנגר שדות הדלין הבריקה
בכוזה כך שני צידי דיד. מצרין הסיכלה ושדות ההליכים. בעיניני. הדלין נשתת
בבית המשפט לצדיק ב' ראבנה ביום 12.7.86, יחדיו - וק בחביסה חודשים לאחר
מועד הסיחקר. באסור, בית המשפט לצדיק כשפחה נתן מסקנה לכך כי ההתביעה לא
דאלר להתביע לצופה אלא בתנאי שנתיים ומדי לאחר מועד הנכחה. אי שלום שנים
נאחר מיום הסיחקה ועכ' ו לפסק דינו של בית המשפט לצדיק פשפחה). נישה זו
דינה להידחות. ובכית "שדות הדלין" בשפי בן הוא. אין מקום לקבוע כי פתיחת
ההליך דינה כהמלב כהמשפט פנים לבדיון לגופו. נזכה, כי זה ודאי מלב אחר
כ"פתיחת הדיון". הפרשנות פיובדה על ידי בית המשפט לצדיק בשפחה לא בוצאת
אחיזה בפשיטה של בית המשפט הנכתיב. על בית משפט זה אם בפרשנות והת שאף הן
פיסקית בפלאטה צרשנות האמנה. הגם יאך לציין כי נדיפה כאמנה על ידי פרשניות של
בתי דינה בדין הפנימי, בצדיק יהיה לציית לתקנה זאי להקנות מרי הדין האדיתי.
דהשכיל "1984 שכותרתה "פתיחת ההליך". תקנה 12(a) מגדירה את המונח באופן
הבא: "הליך בבית משפט יחשב כהפסק תובענה. מעבר לכך שלשון הוק ביותה
בפובן זה קאין המונה לפסל לחלוטין הלין המוכרית, הרי שהבלית התוק אינה
בתיישבת עם הפרשנות שהוצעה על ידי בית המשפט לצדיק בשפחה.

אם פתיחת ההליך בהכרתו ביחד לנושה של הפרישה, יש בכך כדי לעכור את
הדיוה דיתוק לשפיך את הדלין ולבנות את השאלה הדין הבדיוי לגופו. ואכן, בדי
פיעיל לצפה שכם יהיי מענה שדילה הפנות הכחלב טוב יותר בשפרטה אליה דביאה
את הילי כן הכתם שנכתב שם יותר וכ'. בכל כן ובקבעה הקצרה יחסית של
סעה באמנה, התעורר הכא כי הנוסה החיוק יצא ושהי מכך שהקצ פדין בעולמי
הדין. כפי שנביב בכלוף 104 ל- Perez-Vera Report הפנוה פרשנות רשמית
לאמנה:

> "The article as retained the date on which proceeding were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interest of parties protected by the Convention".
> (Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Hague Conference on Private International Law*, Acts

and Documents of the Fourteenth Session (Vol. III, 1980), p. 459).

יחזה לומר", כי הכוונה בקביעת הנוסח בפתיחה הסתיים ולא בסוף הדין ונועדה להגן על הדוברים הבאים להביא להצגה על פי האמנה – הוא הדרה שבעבר נאמרה הילר.

באת כוח המבקשת, עו"ד ו' צימרן, הדגישה בדיעה זכר שכוונתו בפרשנות שנשה להעניק "פתיחת הלב" אך דינה כי הכללה היום היא לפרש את האמנה באופן המתיישב עם מטרת הילד. המשובתי לכך היא כי העניין תלוי בבחינת נסוח החלק הפרטני. ישנם מקרים שבהיבם מורכים פרשנות ולא ניתן להגדירם באמצעות הצמדה על נקודה כפריטת על ציר הזמן. כך למשל, לעניין פרשנות המונח "מקום מגוריו הרגיל" של הילד. מקובל עלי כי בפרשנות כזאת ניתן יום מקום לבחון את העניין כולנדה הבאה של הילד, אך קיימות בפסיקה גם אפשרויות אחרות (ראו למשל: ע"מ (כ"ס) 130/08 פלונית נגד פלוני (31.8.08) שם כופיעות ניסות שונות בכל הקשור להגדרת רבונה "מקום מגוריו של הילדים". אולם, "פתיחת הלדים" אינו בתוח שכזה. לו יהה מכתן האמנה להגדיר את הכוונה באופן מהמצה, ושאר היה לנהיג מתחים כגון "מבחן מפיעה הראשית", "מבחן נתק הדין" או "מבחן מפיעה החליך לניפוי". האמנה בנויה על איזנים צדדים בדי להילחם נגד התופעה הקשה של חטיפת ילדים מבלי לבריח ואין מקום לבחן פרשנות לאמנה שאינה תיאמה את מילוהה ואת תכליתה.

5 מפנה טענה של המבקשת שהתעורה כדיין היא החכם מעם הבעת המבקשת לארצה הבריה בדי ליטול חלק בהליך אשר אמיר להתנהל שם, עלולה להיעדר מהמאה משמיה הכיפה לכלהמות. אכנם, זו הבעיה שהוצא נגד המבקשה ביחל אבל אין בניה, כך וכאן, כי הכיפה יהנה לשלמנים באשר המבקשת תניח לאחזה הבריה כדי להשתדר בנפשם. בהשוכה לכך, הדגיש בא כוח המשיב, עו"ד א' שרידמן, כי יהא מוצן להגיש מבחב מפעם המשיב, אשר ייכלה לפיקליהה המקומית בארה"ב, כו יודיע כי אין בפעין כלל שהמבקשה תעצר באמרי. שוחק בביאב שכוח, מיום 10.8.10, שפוען לפגן החובע הכללי של מדינת נוחדה, הובע ליידי ביכים המאיזנים. המכתב שהחקבל היה בזור תוך בו כפורמה כי הבעיב אין בכיהיך ואין לו בל טוחה לפעול לקיומם של הילדים פלילים נגד המבקשת. עוד ביקש המשיב שיינתן משקל רב לעברה מזרח. נדמה כי המכתב האמור מידע את הדוח מבמיב החפעות שהעלתה בפני בוח המבקשה בדבר הסיכוי להמצה על מדשתה. יכול הוא, כי אין בפברה המשיב כדי

App. 21

6

לחייב את פרקליטי רכחני בבירית בצדק. יחד עם זאת, יצוין כלכר כי למעשה מקרים חריגים כגון המפה לא תיק בידוע אירטיו את חכישה תוצרת – הדברי כי הבקשה תיצגר איני נכחה. יידאי אין היא נידול יידי בכל דוגמה אבי יעיד למרנה מכם נרצ הילר על ידי כדי לרשתיף בהליך המכאני. לו וקבל את הטענה, יידא שהנוהה התוכף היא רשאי לפתוח כי חובה להשאיי את הילד בברירה אלית ;לית בפל הנוסף לכמדת בחרירה בה בוצעה המרשה. בכוכן, אין זו עברה הפסיקה.

וקידה אחרינה כיאיית לצין היא כי לא היה מקום לקבוע שהבשיב השליט עם רשישה הילד לאחר שהוצא לגרוית ישראל. ההפך היא הנכון – נראה כי פעילותו של הבשיב מכיל בדי וחר כי היא אינו בשליט בלל וכלל עם ההבירה.

6 העולה כך הכתובן, כי הואיל וכוכנם שהבבקשה בידנה פגלת חמישה בלפי בנה, והבירים האחרים נמצים בין 13-11 לאבהה אינם חלים, צדק בית הבשפט המחוז בהחלטתו. הלכה למעשה, להורות על קיום הכפסם בארצות הברית, ואת תוך בדי בישול צפק ייכי של בית המשפט לבירוני כמענה.

יצוין כי המסכנות של חיית הבקשה היא שהצוק הצדיק בפסק הדין בביה המשפט המחוזי היו בחיקף. זל פי כפף זה, כל בית המשפט לבירוני משפחה לוקן יכנדי המדות הילד לצידיב. המדות המרשות, ובמחה פגדות וכדוד לקטן בכל הנוגע בהפעלת כשם כנורי וקנון בישראל לאחריב. ואת, בכמה לשכנד על סיבת הילד בהקושה כי שיבית בית המשפט בארצות הברית. ויקן להציח כי בית המשפט לעניד משפחה יצפל בהקשר של כנה להכיע הצדיק הבירות בעניים בנו להעביר את הקטן לארצות הברית. יש לכיוון, כי הצדיק יכיני שהמסוקף להם הני כנם ובנחם להצביר צלי בהקיפה הקרובה בהילנר יצבר לארצות הברית ובכנר - נטחב גם להקל עליו. ניתן להניח כי הנבדל בין שתי האפשרויות עשוי להיות כפפיעתי מאוד עבור הילד בדומה הדברים בו בצד.

7. לא נמצאר כי טענה בית המשפט המחוזי בטעמנו. לא היה מקום להזמיד את צפק בינו של בית המשפט לעניני משפחה של כנו. הייתי מציע לדחות את הבקשה ולהמבקשת ביקש בהוצאות הכסיב בכך 30,000 שיח לדום.

ש ו פ ט

App. 22

א. נבהיר אני לחומרת רצף של תכני השופט ברוך. הילי אכנח הצג, ביומי כאשר ושלמות שנים בתי החביפה, בעוררים תביר שאלה אנושית קשה, ככן את כחיר הכבב שנוכר כשלם לא אחת הקשין בעצמו, נשוא ההליכים, ובכחוח נפקר מלי עין ההורה הדיכוף. בבש"א 69/38333 פלוני נ' פלוני (לא פורסם) נזדכן לי לאמור:

> "חילי אמנם הצג מבבצב ניסצים שינויים אנושיים, בלתבר בין הורים, הנשואים להיות אנשים נורמטיביים בחלילה, אך הבבקשים לחיות כל אחר או אחת בארץ אחרת. הסור הבינלאומי בינאי העולמי ובירחת הקלה רציניות לי קבע את אכות הצב, לטם הכמהיח החוחתם הבירחית של ילדים שהוחזקו שלא כדין אל מדינה אחרת (השופטת פרוקצ'יה בבש"א 672/06 פלונית נ' פלוני (טרם פורסם), פסקה 8), וכפי שציינה, בכנען דא מנריצה שהצב הילד יוק בקום שהשלכה טבר על התצלית הבינוית של האמנה. כל חיק מחיקים אלה מיצג צילמות אנושיים, יחל כולנה עילטו של הקטן הבישלבל במקום למקש."

ב. כן, לצערי, גם בענייננו; האם פעלה שלא כדין, ובפי שהיצר הבית השופט רנטל, כל הדוכיב טבילות לכיוון שהותה צליו ביה המשפט המשרי, החזרת הקטן. יתכן כי אינו צפר של שלמלת הקטן היה בתודעתו של בית המשפט למשמתה, שצב נדרש (על צי תוית דעת הטופחיה) לחשש ניתוק של הקטן כאבו. אני איננו מאמינים כי חשש זה של ניתוק יתבטש אלילה, וחברי היזיחם לניסא החשש בהליכים פלליים נגד האב ובצדקתו, גם טטח בטאבו הבוכר של האב לתבירה בטוחדה. האם גם אינה זוה לאחר"ב זל פי תלורחיה האחרונה, ולבן יש משבעות באמפיריות ההתפתחות עם השיבה לבם.

ג. טשאיב הקטורים בטבונלותו האבהית של האם (שפטי כבר יצר לאיטון, ובר האמור ידשון), יוכלו לשוב ולהתברר בפקים הראוי להם בבית הבשפט באה"ב, אשר יש לנניה כי יחון זל פי פקרון טובת הקטן.

ד. בטופו של יום אבית את החקה כי הצדדים יבצאו ודונים, הטלולה להיות פבוזית, לקום קצר רצוי לם האב בבבנות בשפטית האם, ויאפשרו לקטן לנסול באופן סביר בטאיש שבבבצם אתם אכוסים, אך אפשריים. בא טוח האב הזהיר לעניין זה בפניטו בדיון, כי שולחו מצויין "להזות אב פעיל בחי הילד, לראות אותו באופן

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APPENDIX B

State of Israel

At the Supreme Court

Motion for Leave to Appeal (Family Matters) 5690/10

Before: The Honorable Judge E. Rubinstein
The Honorable Judge N. Hendel
The Honorable Judge U. Fogelman

Petitioner: *A*

Versus

Respondent: *B*

Hearing on a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court dated 8.7.10 in Misc. Family Matters 18359 rendered by Judges I. Stufman, T. Shapira and S. Shohat

Hearing Date: 30 Av 5770 (10.8.10)

ORIGINAL IN HEBREW

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 12-820

In The Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* MEXICAN ASSOCIATION FOR ABDUCTED AND MISSING CHILDREN IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Mexican Association for Abducted and Missing Children (*La Asociación Mexicana de Niños Robados y Desaparecidos, A.C.*) files this *amicus curiae* brief to express its opinion with respect to the issue raised before this Court.

The Mexican Association for Abducted and Missing Children ("Mexican Association" or "*Amicus*") is a non-profit organization which was established in 1997 by Ms. María Elena Solís Gutiérrez. Ms. Solís Gutiérrez founded the Mexican Association after her granddaughter was abducted on November 19, 1994, and later recovered in January of 1995. The purpose of the Mexican Association is to assist individuals whose children have been abducted by providing legal advice, legal assistance, and investigative services. Given that the Mexican Association is singularly well-known within Mexico for the work it does, it also acts as a national clearinghouse for missing and abducted children.

If an abducted child cannot be located, it cannot be recovered. Often, whether a child can be located depends on whether the individual who has abducted

---

[1] Counsel for all parties have consented to the filing of this brief, and their consents have been lodged with the Clerk of this Court. No counsel for any party had any role in authoring this brief, and no person, other than the named *Amicus*, has made any monetary contribution to the preparation and submission of this brief. *See* Rule 37.

that child permits the whereabouts of that child to be known. When the whereabouts of a child are not known, locating that child can be difficult and slow-going; locating that child may be impossible. The Mexican Association has managed many such cases.

This matter involves the application of a standard of review under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") which may prevent individuals from recovering their abducted children despite the fact that they have made every possible effort to locate them. The *Amicus* has an interest in seeing that this Court adopt a standard of review which protects victims of international child abduction who have done all they can to locate their children.

The *Amicus* has a particularly pronounced interest in how this Court decides this case because the majority of Mexican children who are abducted internationally are abducted into the United States, just as the majority of United States children who are abducted internationally are abducted into Mexico. *1999-2010 Hague Abduction Convention Compliance Reports*.

The *Amicus* believes that the issue of whether equitable tolling applies to *Article 12* of the Convention has not been correctly briefed by either side in this dispute, nor the Solicitor General for the United States. Accordingly, the *Amicus* would like to offer its own interpretation of how this issue should be resolved. Our interpretation will address the

concerns raised by litigants who argue that it is not fair to apply the *Article 12* "well-settled" defense where a child has been "concealed" and also address the concerns raised by litigants who argue that the "well-settled" defense is not a statute of limitations which can be tolled. We will demonstrate that the Convention permits trial courts to return children to their nations of origin *pursuant to Article 18 of the Convention* even after they have been found to be "well-settled" in their nations of refuge.

SUMMARY OF THE ARGUMENT

The Convention provides several defenses to the return of a child who has been wrongfully removed from that child's nation of origin. One of those defenses is contained in *Article 12*.

Article 12 provides that where a child has remained in its nation of refuge for one year or longer before an application under the Convention has been filed, that a trial court is not required to return that child if the child has become "well-settled" in the nation of refuge.

Precedent from the Ninth Circuit, *Duarte v. Bardales*, 526 F.3d 563 (8th Cir. 2008), and the Eleventh Circuit, *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), hold that the "well-settled" defense contained in *Article 12* may be equitably tolled where a parent was not able to file a Hague application

within one year of a child's wrongful removal due to the other parent's concealment of the child.

In this case, the Second Circuit disagreed with the Ninth and Eleventh Circuits by holding that equitable tolling does *not* apply to *Article 12* to toll the "well-settled" defense in cases where a parent has concealed a child because Hague tribunals may consider whether a child was "concealed" as *one factor in the "well-settled" analysis*. *Lozano v. Alvarez*, 697 F.3d 41, 51 (2d Cir. 2012).

But the Second Circuit, the Ninth Circuit, the Eleventh Circuit, and all other courts which have addressed this issue, failed to reconcile their holdings with *Article 18* which permits Hague tribunals to return children to their nations of origin *despite the applicability of any and all defenses under the Convention*. In particular, the Second Circuit, and all other courts which have adjudicated this issue, failed to acknowledge that the primary purpose for including *Article 18* in the Convention was to address the concerns raised regarding the invocation of a "well-settled" defense by a parent who has concealed a child. *Explanatory Report* (*infra*), *at 460 ¶106 to 112*.

With the foregoing in mind, a proper application of *Article 12* and *Article 18* compels the following analysis: Hague tribunals must *first* determine whether the *Article 12* "well-settled" defense applies, without considering whether a child was concealed. If, *after* they have determined in the affirmative that the "well-settled" defense applies, *then* Hague

tribunals must decide whether *Article 18* "overrides" the "well-settled" defense.

The decision of whether *Article 18* should serve to "override" the "well-settled" defense – or any other defense raised under the Convention – should be an equitable one. It should be determined by answering the following question: Did the party who seeks to invoke the *Article 18* "override" cause the circumstances which require its invocation? Hence, if the left-behind-parent caused the need to invoke the *Article 18* "override," then it probably should not be applied. But if the wrongfully-removing-parent caused the need to invoke the *Article 18* "override," e.g., by concealing the child, then it probably should be applied.

The difference between including "concealment" in the "well-settled" analysis versus considering "concealment" only *after* a "well-settled" analysis has been conducted, is crucial. By including "concealment" in a "well-settled" analysis, "concealment" is just *one factor out of many* which is weighed to determine whether the "well-settled" defense should apply. But by conducting a "concealment" analysis after a "well-settled" determination has been made and then weighing "concealment" against the "well-settled" determination, "concealment" is given greater weight because *"concealment" can outweigh all of the factors which were used in the "well-settled" analysis.*

For the foregoing reasons, the Second Circuit and the District Court misinterpreted and misapplied

Article 12. Accordingly, this Court should reverse and remand for further proceedings. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002); *United States v. Hinkson*, 585 F.3d 1247, 1251, 1261-1262 (9th Cir. 2009).

On remand, the District Court will need to re-engage in the "well-settled" analysis because it applied it incorrectly by including "concealment" in its analysis. This Court should provide the District Court with guidance by providing factors which the District Court should weigh in applying the "well-settled" defense. We ask this Court to require the District Court to consider all of the following: 1) Parents' relative stability, 2) Home safety issues, 3) Home stability, 4) Important medical considerations, 5) Familial connections, 6) Educational connections, 7) Extracurricular connections, 8) Amount of time in the new country versus the amount of time in the nation of origin, 9) Immigration status, and 10) Other relevant factors. In applying these factors, the District Court must require the respondent to prove by a preponderance of the evidence with "substantial evidence" that a child's "contacts" to the new country outweigh the "contacts" with those of the nation of origin. *State Dep't Legal Analysis § III(l)(1)(c), 51 Fed.Reg. 10494, 10509 (1986); 42 U.S.C. § 11603(e)(2)(B).*

If this Court adopts the undersigned's analysis with respect to *Article 12* and *Article 18*, trial courts will be able to consider "concealment" when deciding whether to apply an *Article 18* "override" without

having to incorrectly include "concealment" in a "well-settled" analysis or improperly toll the "well-settled" defense. In this way, all concerns raised by the Petitioner and the Respondent can be addressed without having to violate the Convention.

ARGUMENT

I. THE SECOND CIRCUIT INCORRECTLY *INCLUDED* "CONCEALMENT" IN ITS *ARTICLE 12* "WELL-SETTLED" ANALYSIS WHEN IT SHOULD HAVE *FIRST* DETERMINED WHETHER THE "WELL-SETTLED" DEFENSE APPLIED WITHOUT INCLUDING "CONCEALMENT" IN ITS ANALYSIS AND *THEN* DECIDED WHETHER "CONCEALMENT" IN AND OF ITSELF SHOULD HAVE "OVERRIDDEN" THE "WELL-SETTLED" DEFENSE PURSUANT TO *ARTICLE 18*

Petitioner asserts that equitable tolling applies to *Article 12* to toll the "well-settled" defense in cases where a party has concealed the whereabouts of a child thereby making it impossible to file an application under the Convention within one year of that child's wrongful removal. He cites *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), and *Duarte v. Bardales*, 526 F.3d 563 (8th Cir. 2008). The Second Circuit found that equitable tolling does *not* apply to *Article 12* of the Convention, holding that a determination of whether a child has been concealed *forms a part* of the "well-settled" analysis. *Lozano v. Alvarez*, 697 F.3d 41, 51 (2d Cir. 2012).

The Second Circuit derived the basis for its holding by citing to *Blondin v. Dubois*, 189 F.3d 240, 246 n. 4 (2d Cir. 1999). *Lozano v. Alvarez*, 697 F.3d 41, 55 (2d Cir. 2012).

But *Blondin* does not support the Second Circuit's position. Footnote 4 in *Blondin* cited to *Friedrich v. Friedrich* (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996); *Blondin v. Dubois*, 189 F.3d 240, 246 n. 4 (2d Cir. 1999). *Friedrich II* cited to *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995); *Friedrich II*, 78 F.3d 1060, 1067 (6th Cir. 1996). *Feder v. Evans-Feder* cited to the Federal Register, specifically, *State Dep't Legal Analysis § III(l)(1)(c), 51 Fed.Reg. 10494, 10509 (1986)*; *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995). The Federal Register states:

> **The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to *the ultimate disposition of the return petition.*** If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations. (Emphasis added).

State Dep't Legal Analysis § III(l)(1)(c), 51 Fed.Reg. 10494, 10509 (1986).

The Federal Register does not state that "concealment" is to be *included in* the "well-settled" analysis.

Rather, it states that "concealment" is relevant to the "*ultimate disposition of the return petition*." Hence, the Federal Register implies that a "well-settled" analysis should be conducted *first* and if it applies, *then* a "concealment" analysis should be conducted to determine whether such a finding is "relevant" to the "ultimate disposition of the return petition."

Such an interpretation harmonizes with *Article 12*:

> Where a child has been wrongfully removed or retained in terms of the Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Article 12, Convention.

Thus, *Article 12* creates an obligation to return a child to its nation of origin *regardless of how much time has passed* since a child has been wrongfully removed. Consequently, it is not a statute of limitations – as asserted by Petitioner.

In addition, it states that if an application is filed more than one year after a wrongful removal, then the child may only be returned if it is not "well-settled" in its new environment. *Article 12* makes no mention that "concealment" should affect, or be included in, the analysis – as Respondent and the Solicitor General insist.

The *Explanatory Report*[2] states:

> *Article 12* forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. . . . To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, *the conditions which attach to this duty where an application is submitted after the aforementioned time-limit*. (Emphasis added).

Explanatory Report, at 458 ¶106.

> The Second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the

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[2] Elisa Pérez-Vera, *Explanatory Report*, in 3 Conférence de la Haye de droit international privé, Actes et Documents de la Quatorzième session, Enlèvement d'enfants 426 (1982) ("Pérez-Vera Report"), available at www.hcch.net/upload/expl28.pdf.

> Convention could not be invoked. The solution finally adopted *plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child.* In any event, it cannot be denied that such an obligation disappears whenever it can be shown that the "child is now settled in its new environment." (Emphasis added).

Explanatory Report, at 459 ¶109.

Hence, the *Explanatory Report* also provides that *Article 12* does not include a time-limit within which an application under the Convention must be filed. Accordingly, it is not a statute of limitations – as argued by the Petitioner.

Rather, the *Explanatory Report* states that if an application is filed after one year, certain conditions attach to the unceasing obligation to return the child. Again, no mention is made that the "concealment" of a child should affect, or be included in, the "well-settled" analysis – as Respondent and the Solicitor General contend.

Notwithstanding the foregoing, the drafters of the Convention foresaw the injustice of applying a "well-settled" defense where the removing-parent "concealed" the child, thereby making it impossible for the left-behind-parent to file a Hague application within one year of the child's wrongful removal.

Indeed, *Article 18* of the Convention states:

> The provisions of this Chapter do not limit the power of the judicial or administrative

> authority to order the return of the child at any time.

Article 18, Convention.

Thus, *Article 18* permits Hague tribunals to order the return of children to their nations of origin at any time despite the fact that *any one or more defenses* have been invoked, e.g., *Article 12*, *Article 13*, *Article 20*, etc.

Indeed, the *Explanatory Report* states:

> ***Articles 12 and 18 – Duty to return the child***
>
> **106** ***These two articles can be examined together since they complement each other to a certain extent***, despite their different character. . . .
>
> **112** ***Finally, article 18 indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time***. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. ***This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e., where, as a result of an application being made to the***

> ***authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.*** (Emphasis added).

Explanatory Report, at 460 ¶106 to 112.

Clearly, "concealment" was never meant to be subsumed into the "well-settled" analysis. Rather, *Article 18* exists specifically to "override" a finding that a child is "well-settled." Hence, a "concealment" analysis under *Article 18* is to be made after a court has determined that the "well-settled" analysis applies.

What is the difference between subsuming the "concealment" analysis into the "well-settled" analysis from conducting the "well-settled" analysis first and then deciding whether the "concealment" analysis should "override" it? By subsuming the "concealment" analysis into the "well-settled" analysis, the "concealment" analysis is given less weight than it should because it is treated as just *one factor out of many* which should be considered in deciding whether a child is "well-settled." On the other hand, by deciding whether to "override" the "well-settled" analysis with a "concealment" analysis, the "concealment" analysis is given *significantly more weight* because the *one factor of concealment can override all of the factors* used to determine whether a child is "well-settled."

For the foregoing reasons, the Second Circuit and the District Court misinterpreted and misapplied *Article 12* because they included "concealment" in

their "well-settled" analysis when they should have considered whether "concealment" in and of itself should have "overridden" their "well-settled" analysis. Accordingly, this Court should reverse and remand for further proceedings. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002); *United States v. Hinkson*, 585 F.3d 1247, 1251, 1261-1262 (9th Cir. 2009).

II. ON REMAND THIS COURT SHOULD PROVIDE THE DISTRICT COURT FACTORS IT SHOULD CONSIDER WHEN IT RE-ENGAGES IN ITS "WELL-SETTLED" ANALYSIS AS WELL AS A STANDARD OF REVIEW TO USE IN DETERMINING HOW TO APPLY *ARTICLE 18*

Article 12 of the Convention does not define the term "well-settled."

The *Explanatory Report* does not define the term "well-settled" either. The *Explanatory Report* simply states:

> The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an

> obligation disappears whenever it can be shown that the "child is now settled in its new environment." *The provision does not state how this fact is to be proved*, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. (Emphasis added).

Explanatory Report, at 459 ¶ 109.

The Federal Register provides contours of a test, but no test in and of itself.

> . . . nothing less than *substantial evidence* of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof. Moreover, *any claims made by the person resisting the child's return will be considered in light of the evidence presented by the applicant concerning the child's contacts with and ties to his or her State of habitual residence.* (Emphasis added).

State Dep't Legal Analysis § III(l)(1)(c), 51 Fed.Reg. 10494, 10509 (1986).

Finally, the implementing legislation for the Convention states that the "well-settled" defense is to be determined on a preponderance of the evidence. *42 U.S.C. § 11603(e)(2)(B).*

Taking into account the abovementioned contours, the respondent must prove by a preponderance of the

evidence with "substantial evidence" that a child's "contacts" to the new country outweigh the "contacts" with those of the nation of origin. *State Dep't Legal Analysis § III(l)(1)(c), 51 Fed.Reg. 10494, 10509 (1986)*; *42 U.S.C. § 11603(e)(2)(B)*. The contacts should be relevant to children. The factors to be considered should include the following:

1) **Parents' relative stability.** Do the parents earn enough to support the child or do they suffer from financial hardship? Are the parents psychologically stable? Do the parents have an erratic romantic life which interferes with their ability to take care of their child? How does this factor counterbalance with the parent's stability issues in the nation of origin?

2) **Home safety issues.** Are there things going on in the house which may not give rise to an *Article 13* defense but which would nonetheless cause concern? How does this factor counterbalance with the home safety issues in the nation of origin?

3) **Home stability.** Are the parents able to provide a stable home or is the child being moved around from house to house? How does this factor counterbalance with the home stability issues in the nation of origin?

4) **Important medical considerations.** Is there any medical reason why the

child would be better off in the new country or the nation of origin? For example, does either country have better medical treatment for a medical condition which the child has?

5) **Familial connections.** Does family live near the child? If they do, do they have a close relationship with the child? Does the family exert a positive or a negative influence on the child? How does this factor counterbalance with the family connections in the nation of origin?

6) **Educational connections.** How is the child doing in school? Has their been improvement in grades since arriving in the new country or have the child's grades suffered? Does the child have special needs which need special attention? How does this factor counterbalance with the educational connections in the nation of origin?

7) **Extracurricular connections.** Is the child involved in extracurricular activities in the new country? Can these or similar activities be provided in the nation of origin? How does this factor counterbalance with the extracurricular connections in the nation of origin?

8) **Amount of time in the new country versus the amount of time in the nation of origin.** In which country has the child spent the majority of his or her

life? Would that be indicia of where a child is more "well-settled?"

9) **Immigration status.** Immigration status relates to whether a child can be "well-settled" in a country because it affects whether that child and/or parents are able to move freely, obtain legal employment, receive government benefits, etc. How does this factor counterbalance with the immigration status in the nation of origin?

10) **Other relevant factors.** Every case is different. Trial courts must be afforded discretion to consider other factors which they believe are relevant to the cases before them.

If the District Court decides that the minor child is "well-settled" in the United States, then the District Court should determine whether *Article 18* of the Convention "overrides" that finding. The Convention is silent as to what factors should be considered in making this decision. The *Explanatory Report* does not provide any guidance either.

Since there is no specific guidance with respect to how to apply *Article 18*, equitable principles should be utilized to determine whether *Article 18* should "override" *any and all defenses available under the Convention*. Whether *Article 18* applies should be determined by answering the following question: Did the party who seeks to invoke the *Article 18* "override" cause the circumstances which require its invocation? If the *applicant* caused the need to invoke *Article 18*,

then the applicant probably should be denied relief under *Article 18*. But if the *respondent* caused the need to invoke *Article 18*, then the applicant probably should be granted relief under *Article 18*. Lastly, if both parties caused the circumstances which require the invocation of *Article 18*, or if neither one of them did, then a balancing of the equities should be conducted to determine whether the *Article 18* "override" should apply.

Hence, *with respect to the Article 12*, if a respondent has concealed a child thereby making it impossible for an applicant to seek relief before one year has elapsed, then the *Article 18* "override" probably should apply. But if the applicant was negligent in failing to seek relief in a timely manner, then the *Article 18* "override" probably should not apply. Lastly, if both parties caused the need to invoke *Article 18*, or if neither one of them did, then a balancing of the equities would need to be performed.

CONCLUSION

The Second Circuit mistakenly held that equitable tolling does not apply to *Article 12* to toll the "well-settled" defense in cases where a parent has concealed a child because it held that Hague tribunals may consider whether a child was "concealed" as one factor in the "well-settled" analysis. But a correct interpretation of *Article 12*, *Article 18*, and the *Explanatory Report*, demonstrates that the "concealment of

a child" does not form a part of the "well-settled" analysis. Rather, the issue of "concealment" should only be considered pursuant to *Article 18* after a determination has been made that a child is "well-settled." In this way, "concealment" does not form a part of the "well-settled" analysis. Instead, a determination is made whether a "well-settled" defense may be "overridden" by a finding of "concealment."

With the foregoing in mind, the Second Circuit and the District Court misinterpreted and misapplied *Article 12*. Accordingly, this Court should reverse and remand for further proceedings.

On remand, the District Court will need to re-engage in the "well-settled" analysis because it applied it incorrectly. This Court should provide the District Court guidance by providing factors which the District Court should consider in applying the "well-settled" defense. Those suggested factors are listed for this Court, *supra*. If the District Court finds that the "well-settled" defense applies, then it should consider whether the "well-settled" defense should be "overridden" pursuant to *Article 18*. Whether *Article 18* applies should depend on which party caused the basis for the need to invoke the *Article 18* "override." Specifically: If Petitioner caused the need to invoke the *Article 18* "override," he probably should be denied it. But if Respondent caused the need for the *Article 18* "override," Petitioner probably should be granted it. If neither party is responsible, or both are responsible, the District Court should balance the equities.

We take no position with respect to who should ultimately prevail in this matter, preferring to leave that ultimate disposition to the District Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

The National Center for Missing and Exploited Children ("NCMEC") was established in 1984 as a private, non-profit 26 U.S.C. 501(c)(3) organization to assist law enforcement and families in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children," and

[1] Both parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

receives funding from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. 42 U.S.C. 5773(b). In addition to working with the Office of Juvenile Justice and Delinquency Prevention, NCMEC works in cooperation with federal, state, and local law enforcement agencies, state missing children clearinghouses, and international law enforcement agencies. NCMEC also works frequently with foreign government entities, including the formally designated Central Authorities of Hague Convention Contracting States, on cases of international family abduction. 42 U.S.C. 5771(9)(C).

Since its inception, NCMEC has been heavily involved in combatting child abductions. Because of its connections to international, federal, state, and local law enforcement agencies and networks, NCMEC frequently transmits information regarding missing and exploited children to law enforcement and other agencies across the globe. NCMEC has also been designated by Congress to track and report on the number of missing children cases, including family abductions.

From 1995 through April 2008, NCMEC fulfilled the functions of the United States Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 24, 1980, T.I.A.S. No. 11,670, 13433 U.N.T.S., for "incoming cases," in which a parent abducts a child into the United States from a Contracting State. NCMEC's work on incoming cases was performed on behalf of the United States Department of State ("Department of State") pursuant to a cooperative agreement among the Department of State, the United States Department of Justice, and NCMEC.

NCMEC handled approximately 5,600 incoming cases before the Department of State assumed primary responsibility over all incoming cases in 2008.

During NCMEC's involvement with incoming cases, it assisted left-behind parents with assembling their applications for relief under the Convention, securing legal counsel, obtaining law enforcement assistance and social services as needed, and obtaining clarification of foreign custody laws from foreign authorities. Although NCMEC no longer handles incoming cases, it continues to provide technical assistance and resources to parents, attorneys, judges and law enforcement officials involved in these cases. NCMEC also continues to maintain the International Child Abduction Attorney Network, a network of attorneys providing pro bono representation in family abduction matters of all kinds, including Convention cases. NCMEC provides legal technical assistance for attorneys at any point during Convention related litigation, including discussing legal questions, referring attorneys to mentors, discussing alternate legal strategies, arranging logistical support, providing third party referrals for counseling and other support, and troubleshooting. Lastly, NCMEC has maintained many of the relationships it developed with Central Authorities, legal representatives, and other agencies in many Convention Contracting States. Its involvement with these key stakeholders, both domestically and internationally, provides NCMEC with valuable insight into the operation of the Convention in the United States and in other Contracting States.

NCMEC also has provided and continues to provide assistance to families on "outgoing" Hague Convention cases, in which a parent abducts a child from

the United States to a Contracting State. To date, NCMEC has provided assistance on over 2,300 outgoing cases.

In addition, NCMEC operates several other programs to assist law enforcement in battling child abduction and locating missing children. NCMEC created "Team Adam," a program that includes dozens of retired law enforcement professionals with experience in missing and abducted children cases to provide technical assistance to local law enforcement and families at no cost. NCMEC supports and provides secondary distribution of the AMBER Alert program to rapidly respond when children are abducted. Congress recently passed legislation creating the National Emergency Child Locator Center at NCMEC to respond to emergencies and major disasters. NCMEC also offers forensic and biometrics services to help law enforcement on long-term missing children cases. Few organizations in the United States have a deeper understanding of the process and resources locating abducted children requires.

NCMEC participates as an amicus before this Court in cases that will have a significant impact on the efficacy and execution of the Convention. NCMEC believes the Convention should operate to best facilitate the return of abducted children and to encourage litigation of custody rights in the appropriate countries. NCMEC has a strong interest in ensuring that Contracting States interpret the Convention consistently and children who are "wrongfully removed" or "wrongfully retained" within the meaning of the Convention are reunited with their families and returned to their countries of habitual residence.

NCMEC believes that the court of appeals' rejection of equitable tolling with respect to Article 12's one-year period undermines the operation of the Convention and, contrary to the Convention's purpose, establishes incentives that promote, rather than combat, international child abduction. NCMEC asks the Court to reverse the Second Circuit's decision and hold that equitable tolling is available where an abducting parent has concealed the whereabouts of the abducted child and, as a result, the left-behind parent is unable to file within Article 12's one-year period.

SUMMARY OF THE ARGUMENT

Equitable tolling is a critical tool for United States courts to give effect to the intended purpose of the Hague Convention's return provisions. As Petitioner explains, Pet. 2, the central and undisputed purpose of those provisions was to protect children from international abductions by removing incentives for abducting parents to flee to another country in the hope of obtaining a more favorable custody determination. By providing that abducted children *must* be returned to their home country if the left-behind parent files a petition for return within one year of the abduction, the Convention seeks to deter abductions from occurring in the first place.

Where an abducting parent has concealed the whereabouts of a child, however, the process a left-behind parent must navigate to file a return petition is a difficult and long one, riddled with myriad obstacles. NCMEC is well familiar with these obstacles from its experience working with left-behind parents searching for children believed to be in the United States as well as its previous experience performing Central Authority duties for the United States. Because of these difficulties, which are explained further below, it is NCMEC's experience that many left-behind parents can diligently search for their concealed children but nonetheless be unable to file a petition within one year of the abduction. In such circumstances, if equitable tolling is not available, the abducting parent is able to reap the benefit of the concealment by asserting the "settled" defense—which is *only* available to that parent by virtue of his or her year-long concealment of the child's whereabouts. Equitable tolling allows courts to

prevent this unfair outcome by taking account of the practical complications that arise in finding abducted children whose location has been kept hidden from the left-behind parent. By precluding the abducting parent from raising the "settled" defense where his or her own misconduct has delayed the filing of a return petition, equitable tolling serves Article 12's overriding goal of deterring and remedying abductions.

No foreign court of last resort has made a final determination regarding the availability of equitable tolling in such circumstances. Because the Contracting States to the Convention strive to consistently enforce its mandates, this Court's decision may influence the adjudication of cases abroad. The availability of equitable tolling in foreign courts would have a significant impact on United States-based left-behind parents whose children have been concealed after being abducted from the United States. As NCMEC knows from its continuing role in helping United States-based parents locate children abroad, the difficulties in such cases are often compounded by the insufficient resources (including inadequate law enforcement or organizational assistance, or availability of other services to assist with locating abducted children) provided in other countries.

NCMEC accordingly urges the Court to reverse the Second Circuit's decision and make clear that equitable tolling applies to Article 12's one-year period.

ARGUMENT

I. EQUITABLE TOLLING SERVES THE PURPOSES OF THE HAGUE CONVENTION BY TAKING ACCOUNT OF THE SIGNIFICANT DIFFICULTIES—BOTH PRACTICAL AND PROCEDURAL—IN LOCATING A CHILD WHEN HIS OR HER WHEREABOUTS ARE CONCEALED BY AN ABDUCTING PARENT

A. The Convention Was Designed To Deter Child Abduction By Returning The Custody Dispute To The Proper Venue

The central purpose of the Hague Convention is to remedy and prevent the problem of international child abduction, a troubling and growing phenomenon with a devastating impact on children and families throughout the world. See Convention Preamble; Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the 14th Session, §§ 16, 25 (1980) (translation of the Permanent Bureau) ("Pérez-Vera Report"). Although no comprehensive statistics exist for how many children each year are abducted, the most recent global data regarding return applications filed under the Convention suggests that well over one thousand children are internationally abducted per year. In 2008 alone, 1,961 return applications were filed under the Convention worldwide. Nigel Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I—Global Report 9 (Nov. 2011) ("Part I—Global Report"). More recently, in 2012 the Department of State received 1,143 new cases of internationally abducted children, involving 1,617 children.

United States Dep't of State, New Outgoing Cases CY 2012, http://travel.state.gov/pdf/CY2012-Outgoing_Openstats.pdf; United States Dep't of State, New Incoming Cases CY 2012, http://travel.state.gov/pdf/CY2012-Incoming_Openstats.pdf. Of these cases, 799 involved American children wrongfully removed to Contracting States (referred to as "outgoing" cases). *Ibid.* That same year, the United States received 344 "incoming" cases—involving children abducted from other countries and taken to the United States—involving 473 children. *Ibid.*

The international abduction of a child can devastate a family. Parental child abduction has been recognized as a serious form of abuse for over 30 years. See Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse* (1982), in American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, Parental Abduction Project, Investigation and Prosecution of Parental Abduction (1995). The abducted child experiences the instantaneous loss of community, which can lead to prolonged depression. The child also loses a sense of security or stability and the ability to trust others, and acquires a fear of abandonment. See United States Dep't of Justice, The Crime of Family Abduction: A Child's and Parent's Perspective 7 (May 2010) ("The Crime of Family Abduction"), https://www.ncjrs.gov/pdffiles1/ojjdp/229933.pdf. As this Court previously recognized, studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues. *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1996 (2010) (citing Nancy Faulkner, Parental

Child Abduction is Child Abuse (1999), http://www.prevent-abuse-now.com/unreport.htm). These issues are only magnified when a child is abruptly taken to a new country, with potential communication barriers and different customs. The aftermath of abduction can be lengthy, as reunification with left-behind family members can be a difficult process. See Geoffrey L. Greif, *The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy*, 37 Am. J. of Family Therapy 273 (June 16 2009). Preventing and deterring abductions is critical because there is no way to "un-ring the bell" when it comes to the trauma faced by children and left-behind parents.[2]

Troublingly, some sources indicate a long-term upward trend in international child abductions. A survey of return applications in 2008 indicates a 56% increase from the total number of applications received in 2003 and a 106% increase from the number of applications in 1999. Part I—Global Report at 9. Excluding new Contracting States, there was a 45% increase in return applications from 2003 to 2008. *Ibid.* The United States is directly impacted by this growing problem, having received, for example, 283 incoming cases in 2008—the highest number of return applications received that year by any Contracting State, and representing fourteen percent of that year's total "incoming"

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[2] International abductions can happen in a variety of ways, including taking a child to another country ostensibly for another purpose—such as for vacation, to visit family, or to care for a sick relative—but then refusing to return. See The Crime of Family Abduction at 26-27, 29. Such conduct constitutes wrongful removal or retention under the meaning of Article 12.

cases worldwide. *Ibid.* The United States also filed 309 outgoing cases in 2008. *Id.* at 13.

As the number of incoming cases continues to rise, the requests for assistance to networks providing pro bono counsel for left-behind parents also increases, making it less likely that each parent in need will obtain the help he or she needs in a timely manner. All the while, international abduction continues to exert a devastating emotional, financial, and social toll on the families and children involved.

B. The Operation Of The Convention's Return Remedy

To achieve its goal of curbing international child abductions, "[t]he Convention's central operating feature is the return remedy." *Abbott*, 130 S. Ct at 1989. A Contracting State must "order the return of the child forthwith" when the child has been "wrongfully removed to or is retained in" a Contracting State other than his or her country of habitual residence. Convention Arts. 1, 3, 12. Through the return remedy, the Convention is intended to preserve the "pre-abduction allocation of custody rights." *Abbott*, 130 S. Ct. at 1989. Notably, courts hearing Convention cases do not decide the merits of an underlying custody dispute, but simply determine the appropriate jurisdiction in which the custody dispute is to be heard. See Convention Arts. 16, 19; 42 U.S.C. 11601(b)(4). The ultimate custody determination is made in the proper venue, which is the judicial system of the child's habitual residence.

The Contracting States' Central Authorities play an important role in carrying out the Convention's aims, and are charged with helping investigate the

whereabouts of the child and, where possible, facilitating the voluntary return of the child, among other responsibilities. See Convention Art. 7; Pérez-Vera Report at 435, ¶ 35. In cases where a child is abducted to the United States, the Central Authority of the country of origin receives the application from the left-behind parent and then forwards it to the United States Central Authority ("USCA"), who helps the left-behind parent prepare to initiate court proceedings seeking return of the child.[3]

As Petitioner rightfully emphasizes, Pet. Br. 3-4, Article 12's return remedy is the primary means by which the Convention's deterrence and remediation goals are carried out. It does this by setting forth a mandatory rule: if the petition was filed within the one-year period, the child *must* be returned to his or her home country. Convention Art. 12; see also *Abbott*, 130 S. Ct. at 1989 (noting the "central operating feature" of the Convention is the "return remedy"). Article 12 thus not only confers a clear right to the left-behind parent—to have the child returned to his or her home country to determine custody—but also sends an un-

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[3] When a child is abducted from the United States to another Contracting State, the USCA likewise facilitates efforts to secure the return of the child, and NCMEC may also provide assistance. See United States Dep't of State Office of Children's Issues, http://travel.state.gov/abduction/solutions/opencase/opencase_3849.html; United States Dep't of State Office of Children's Issues, http://travel.state.gov/abduction/solutions/locatechildren/locatechildren_3850.html; see also United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006), http://www.hcch.net/upload/abd_2006_us.pdf.

ambiguous message to abducting parents that they will not be allowed to get away with international abduction. Article 12 in addition, sets up a secondary rule: If the child has been abducted for over a year, the court still must return the child to his or her home country so long as the abducting parent cannot demonstrate that the child is settled in his or her new environment. Convention Art. 12 (noting that, where a petition for return is filed more than one year after the wrongful international removal, courts "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment"). Article 12's provisions are supplemented by Article 18, which states that there is no limit on the power of a judicial or administrative authority to order the return of the child at any time. Convention Art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.").

As further detailed below, NCMEC believes that equitable tolling of the one-year period in Article 12 is necessary in order to prevent the "settled" exception from swallowing the rule of the return remedy—a result that would contravene the overriding purpose of the Convention. The process of locating an abducted child and preparing the case to be filed is lengthy and difficult, and can easily take longer than Article 12's one-year period. As detailed below, this demonstrates that left-behind parents can diligently search for their concealed children but still miss the one-year period, all through no fault of their own. Equitable tolling prevents left-behind parents from being further disadvantaged by abducting parents' wrongful conduct and

avoids creating perverse incentives for abducting parents to conceal the whereabouts of their children.

C. The Obstacles Left-Behind Parents Confront

To secure the return of their abducted children from the United States pursuant to the Convention's provisions, left-behind parents must at a minimum (1) discover where the child has been taken; and (2) obtain the assistance of legal counsel. Neither of these tasks is easy and both can be extremely time consuming, quickly "running out the clock" on the year allotted before the abducting parent becomes entitled to assert a settled defense. In addition, left-behind parents may have to contend with language barriers, financial constraints, and lack of knowledge and familiarity with a foreign court system.[4] Having assisted in thousands of incoming cases up until 2008, and continuing to play an active role in outgoing cases today, NCMEC is well-aware of these burdens and how they play out in practice.

When an abducting parent has concealed the whereabouts of the child, accomplishing these tasks becomes even more difficult. In case after case, NCMEC has seen first hand that an abducting parent's concealment of the child's location is all too often successful in preventing the left-behind parent from locating the abducted child.

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[4] Moreover, it is NCMEC's experience that left-behind parents frequently lack awareness of the Convention's existence, the return remedy it provides, or the local resources available in the parents' home countries.

At the outset, it is important to recognize that concealment can take a number of forms, all of which make finding an abducted child difficult and, in some unfortunate cases, practically impossible. On one end of the spectrum are a number of dramatic ways in which an abducting parent can conceal the whereabouts of the abducted child. For example, the abducting parent may attempt to live under an assumed name, refuse to enroll the child in school, or even alter his or her own appearance or that of the child.

Importantly, however, less dramatic types of concealment—such as refusing to provide information to the left-behind parent as to where the abducted child has been taken—can make it just as difficult to locate the abducted child. These more passive forms of concealment can consist of failing to return phone calls from the left-behind parent, *Atunez-Fernandes* v. *Connors-Fernandes*, 259 F. Supp. 2d. 800, 808 (N.D. Iowa 2003); claiming to go on vacation while actually moving to a different country with the child, *Belay* v. *Getachew*, 272 F. Supp. 2d 553, 557 (D. Md. 2003); taking the child to a different country under the guise of another excuse, such as interviewing at schools, *Croll* v. *Croll*, 229 F.3d 133, 136 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001); leaving a family member's address as the mail forwarding address, *Furnes* v. *Reeves*, 362 F.3d 702, 708 (11th Cir. 2004); preventing the child from telling the left-behind parent where the child is located, *In re Giampaolo*, 390 F. Supp. 2d 1269, 1274-1275 (N.D. Ga. 2004); or asking family and friends to keep silent about the new location of the child, *Bocquet* v. *Ouzid*, 225 F. Supp. 2d 1337, 1342 (S.D. Fla. 2002).

In NCMEC's experience, these methods of concealment can stymie a search just as effectively as more extreme tactics, and can easily cause even well-resourced and diligent parents to file outside the one-year period. Accordingly, the Court should not make the availability of equitable tolling dependent on the lengths to which the abducting parent goes to conceal the child's whereabouts. When that concealment has been successful—i.e., where it has contributed to the left-behind parent's inability to file within Article 12's one-year period despite diligent efforts—courts should equitably toll the one-year period to prevent the abducting parent from gaining a considerable advantage from his or her inequitable tactics.

1. *The Left-Behind Parent Must Personally Determine Where the Child Has Been Taken*

The first steps in the process to obtain a return order pursuant to Article 12 are confirming that the child has been removed from the country and then determining which country the abducted child has been taken to. This is critical because, in contrast to many other Contracting States, left-behind parents seeking return of a child from the United States cannot commence Convention proceedings merely by contacting their home country's Central Authority or law enforcement agency with a complaint. *Wojcik* v. *Wojcik*, 959 F. Supp. 413, 418-419 (E.D. Mich. 1997) (finding that the father's filing of a request for the return of his children with the French Central Authority did not commence proceedings). Rather, left-behind parents must initiate court proceedings in the country where the child is actually located. (And in the United States, as further dis-

cussed below, parents must go one step further: they must identify the specific court within whose jurisdiction the child is located.)

Depending on the information disclosed and clues left behind by the abducting parent, this task can range from simple to extremely difficult. Where the abducting parent leaves little or no indication as to the child's whereabouts, a left-behind parent can easily spend the full one-year period specified in Article 12 just trying to determine which country the child may have been removed to, and thus which foreign Central Authority is the correct one to file a return application with.

Consistent with this reality, and to increase the likelihood that left-behind parents will be able to locate their abducted children, NCMEC advises left-behind parents to look for any possible information as to where the abducting parent might have taken the child, and to persist in seeking up-to-date information about their whereabouts. For example, in its litigation guide for counsel representing parents in Convention cases, NCMEC warns that the success of investigations undertaken by Central Authorities to locate abducted children often hinges upon the extent and accuracy of information the left-behind parent can provide, such as the locations of relatives, places of employment, business connections, or other sources of potential support for the abducting parent. See NCMEC, *Litigating International Child Abduction Cases Under the Hague Convention* 92 (2012) ("NCMEC Guide"), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf. For many left-behind parents, the potential avenues of investigation are overwhelming.

In another publication designed to assist left-behind parents in this difficult endeavor, NCMEC further suggests that left-behind parents investigate everything from airline, bus and train records, to garbage left behind by the abducting parent, to firearm registration or licenses and resources at local libraries in order to try to locate the child. NCMEC, *Family Abduction: Prevention and Response* 63-75 (6th ed. 2009). But even where some information is inadvertently left behind by abducting parents, it can quickly become outdated, since abducting parents may move frequently—either to prevent the left-behind parent from locating the child, or for other reasons, such as lack of resources, transitory living accommodations with relatives or friends, difficulty enrolling children in school, illegal immigration status, or a general fear of detection by law enforcement officials. This only makes it more difficult for left-behind parents to locate their children and, accordingly, to file a return petition.

Moreover, undertaking an investigation of this nature can become incredibly expensive, especially when the left-behind parent must turn to professional help to locate the child.[5] Illustrating the extent of this financial

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[5] To help overcome at least some of the financial burdens involved, NCMEC administers a "Victim Reunification Travel Program," which funds travel for left-behind parents to attend custody hearings or to be reunited with their children. From 1996-2010, NCMEC disbursed more than $715,127 in funds to support the travel of left-behind parents. However, the Program is limited to situations in which the child's location has been determined; it unfortunately is not able to offer financial assistance to left-behind parents seeking to travel to another country to search for their abducted children.

burden, the Department of Justice noted that in a survey of left-behind parents, respondents reported spending an average of $33,500 for search and recovery efforts and that about one-fourth of these parents reported spending $75,000 or more. Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, Juvenile Justice Bulletin 6 (Dec. 2001) ("Juvenile Justice Bulletin"), https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf. More than half of the parents surveyed reported spending as much as or more than their annual income on search and recovery efforts. *Ibid.* Unsurprisingly given these high numbers, a lack of sufficient funds was the most frequently identified obstacle to recovering an abducted child. *Ibid.* Even where left-behind parents can amass the funds to enlist professional help, that process can take considerable time, further delaying the search effort.

In short, because of the difficulty of determining where the abducting parent took the child, a significant amount of time may elapse before the left-behind parent has reliable information that the abducted child may be located in a particular foreign country.

2. *Locating an Abducted Child is Difficult Even Once the Proper Central Authority is Contacted*

Identifying the country to which the abducted child has been taken is only the beginning: the left-behind parent must then determine where *within* that country the child is located. Even with the resources of the United States Government and other organizations, this step, too, can be expensive and time-consuming.

When the child is suspected to be in the United States, the left-behind parent first must contact the Office of Children's Issues of the Department of State, either directly or through the Central Authority of the left-behind parent's country. The Office of Children's Issues then assigns a case officer to help the left-behind parent locate the child. Various entities and agencies assist with this process, including non-governmental organizations, such as International Social Service ("ISS"), the Federal Bureau of Investigation, the International Criminal Police Organization, and individual states' missing-child clearinghouses. In addition, media campaigns sometimes are used to create awareness that can lead to useful information about the location of a child.

Coordinating all of these agencies and entities can be an onerous and slow-moving process. As the Department of State has noted, "[f]or abductions into the United States, the civil nature of the Abduction Convention process has caused some difficulty in liaising with law enforcement entities, which, in spite of federal implementing legislation requiring them to assist with information sharing with respect to location efforts, sometimes consider Abduction Convention cases as a lower priority than criminal enforcement activities." United States Dep't of State, Response to the Questionnaire Concerning the Practical Operation of the 1980 and 1996 Conventions 6 (2011) ("Response to Questionnaire"), http://www.hcch.net/upload/abduct2011us1.doc. In addition, some law enforcement entities are reluctant to share information with the USCA because it is not a law enforcement entity itself. *Ibid.* All of these factors can result in a delay, potentially ex-

hausting Article 12's one-year period despite the left-behind parent's diligence.

Other countries and government agencies likewise have noted the difficulties with this stage of the process. Mexico is one of the Contracting States that has the highest number of incoming cases to the United States. In a response to a recent questionnaire distributed by the Hague Conference on Private International Law ("HCCH Questionnaire"), Mexico commented that in the United States there are "[d]ifficulties to loc[ate] the children." Secretaría de Relaciones Exteriores-Dirección General de Protección a Mexicanos en el Exterior, Dirección de Derecho de Familia, Response to the Questionnaire Concerning the Practical Operation of the 1980 and 1996 Conventions 6 (2011) ("Mexico's Response to Questionnaire"), http://www.hcch.net/upload/ abduct2011mx1.doc. This issue also is noted in a bulletin from the United States Department of Justice, which reported this difficulty in completing the preliminary steps in initiating a Convention case "has been expressed by many left-behind parents and by a number of professionals in the field of missing children." Juvenile Justice Bulletin at 15. Especially considering the increasing number of incoming cases, these threshold delays can contribute to the left-behind parent filing after the initial one-year period has elapsed.

The Department of State, in its response to the HCCH Questionnaire, acknowledges that it has experienced some problems relating to the duties of the Central Authority as required by Article 7 of the Convention, which charges Central Authorities with the duty "to discover the whereabouts of a child who has been wrongfully removed or retained." Response to Ques-

tionnaire at 9; Convention Art. 7(a). The Department of State observed that there are difficulties exchanging information related to the "social background" of the child because "respect for family privacy in the United States has created a high threshold for inquiry or intervention of social services, who will normally only act if they receive information that a child is at risk of abuse or neglect." Response to Questionnaire at 9. This comment illustrates the challenges of coordinating searches with agencies whose main purpose is not to locate internationally abducted children and who must focus on other priorities.

D. Obtaining Counsel Is Difficult And Time Consuming

The last critical step in the process is finding counsel to represent the left-behind parent in his or her effort to obtain a return order under the Convention, which requires initiating court proceedings.[6] Many left-behind parents face a language barrier and are unfamiliar with the United States court system. Therefore, NCMEC advises in its litigation guide that it is important for left-behind parents to retain counsel. Because many left-behind parents do not have the financial means to pay for legal representation, they may need help not only to find counsel, but also to find an attorney willing to take on their case pro bono. NCMEC, through its work on Hague Convention cases, maintains a network of lawyers in the United States

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[6] This step often must wait until after the child's location has been identified, since, in order to initiate court proceedings for the child's return, counsel must be admitted to practice in the appropriate jurisdiction.

who are willing to take on these cases pro bono. Nevertheless, even with these relationships, finding counsel may use up the remaining months left in the initial year period.

There are important distinctions between the processes of obtaining counsel for left-behind parents searching for children in the United States as opposed to other countries. First, the USCA does not bring suit on behalf of the left-behind parent seeking the return of an abducted child from the United States. Second, the USCA does not provide counsel for the left-behind parent.[7] Third, the jurisdiction in which to file suit must be identified before proceedings can be initiated. By contrast, several Contracting States, such as Austria, Chile, Costa Rica, Denmark, Hungary, Ireland, New Zealand, Norway and the United Kingdom, provide a government-appointed attorney to represent the left-behind parent's interest as soon as the that parent files an application with the Central Authority of these countries. See Bureau of Consular Affairs, Office of Children's Issues, Department of State, Child Abduction Country Information, http://www.travel.state.gov/abduction/country/country_3781.html. In other Con-

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[7] The United States is somewhat unique in requiring left-behind parents to find and pay for counsel. The United States made a specific reservation to Article 26 of the Convention, which prohibits Central Authorities from charging applicants for the cost and expenses of legal counsel or advisors. Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986). Therefore, unlike in many other Contracting States, the USCA is not required to, and does not, locate and pay for counsel in incoming cases.

tracting States, such as Australia, Belgium, Croatia, the Dominican Republic, France, Greece, Italy, Morocco, South Africa and Turkey, the Central Authority will commence proceedings itself after receiving an application from a left-behind parent. *Id.* In contrast, left-behind parents filing in the United States merely receive a list of potential attorneys from the USCA. After receiving that list, it is up to the left-behind parents themselves to contact the attorneys—even when there is a language barrier—and, in many cases, attempt to convince an attorney to take on their case pro bono.

Left-behind parents have repeatedly noted that obtaining counsel represents another significant hurdle in filing their petitions. As Mexico noted in its response to the HCCH Questionnaire, in the United States "[i]t might take longer than a year to find an attorney to present a case . . . [and] private attorneys are very expensive." Mexico's Response to Questionnaire at 6. Mexico also observed that "[i]n the case of the United States a pro bono attorney might be found in most cases however months may elapse until the presentation of the case." *Id.* at 7. A left-behind parent can do his or her utmost to try to file within the one-year period, but because of the need to find counsel, as Mexico notes, it can be over a year before the petition is filed and the proceeding commences.

Indeed, although Mr. Lozano filed an application with the Central Authority for England and Wales on March 15, 2010 and that application was sent to the Department of State on March 23, 2010, it took until July 27, 2010 for Mr. Lozano to secure pro bono counsel. As in many cases, obtaining pro bono counsel was critical because it was only with the help of the Department of

State, a private investigator and pro bono counsel that Mr. Lozano ultimately was able to locate his daughter. Pet. 6. Absent tolling, the one-year period expired during the four months it took Mr. Lozano to locate counsel in the United States. It would be an additional three months before Mr. Lozano could locate his daughter in the United States and initiate proceedings.

While a search is conducted to pinpoint an abducted child's location within a jurisdiction, or to retain counsel, a left-behind parent's information as to the whereabouts of the abducted child can become stale. Because judges often demand verification of the abducting parent's and child's presence within the court's jurisdiction, left-behind parents and their counsel must be sure they have properly located the child before filing. To that end, NCMEC advises left-behind parents to conduct an independent investigation in anticipation of the court's questions. NCMEC Guide at 92-93. Left-behind parents are advised to "[a]t a minimum, . . . verify the identification of the abducting parent, the presence of the child in the jurisdiction, any school or day care attended by the child, and the existence of any public records confirming their presence in the jurisdiction (such as criminal or property records)." *Ibid.* Even at this advanced stage of the search process, with the investigation completed and counsel in hand, a left-behind parent may initiate proceedings only to discover that the abducting parent has once again relocated (or fled)—requiring the left-behind parent to start the search for child and counsel all over again.

E. Equitable Tolling Allows Courts To Address These Difficulties And Thus To Carry Out The Purpose Of The Convention

Equitable tolling allows courts to take account of the real-world difficulties in mounting a search for an internationally abducted child, and thus to carry out the Convention's purpose of deterring and remedying such abductions. As the above discussion demonstrates, a left-behind parent can search diligently, but through no fault of his or her own, fail to locate the child within Article 12's one-year period. Even determining the country to which the child has been taken can prove a serious challenge, and this alone can take a good deal of resources—such as money for a private investigator, or the ability to fly to the suspected country and track down clues and leads personally. Once the left-behind parent determines he or she should go to the Department of State, rather than the Central Authority of Mexico, France or anywhere else in the world, it may take the Department of State and other assisting entities some time to mobilize the search and determine which jurisdiction the child is living in. Only then can the left-behind parent attempt to retain counsel in the appropriate jurisdiction, which may take months or longer. And when the actual petition is ready to be filed, the child's location must be confirmed again to ensure the child has not been moved and the petition is filed in the correct court.

The instant case demonstrates the simple reality that, where the abducting parent has concealed the whereabouts of a child, the left-behind parent cannot always surmount these considerable obstacles within the one-year period—even with diligent efforts and the

involvement of numerous law enforcement entities, assistance organizations, and pro bono counsel. Ms. Alvarez removed the child to the United States without a visa, overstaying a tourist visit. Pet. 5. Mr. Lozano, the left-behind parent, applied for several disclosure orders[8] on Ms. Alvarez and her counsel in order to discover his daughter's whereabouts. Mr. Lozano first applied for a disclosure order on September 16, 2009, and his last disclosure order was returned on February 22, 2010. *Id.* at 6. It was only after exhausting the British court system that Mr. Lozano could conclude with any degree of certainty that his daughter was no longer in the United Kingdom. Because Ms. Alvarez refused to inform him about the location of their daughter, Mr. Lozano had to waste precious months determining if his child had been abducted to another country, which country that might be, and whether a Hague petition was appropriate. To refuse equitable tolling in these circumstances would give Ms. Alvarez the benefit of her concealment and would penalize Mr. Lozano for appropriately exhausting his domestic options, as the Convention contemplates.

Other factual scenarios could present additional ways in which the abducting parent's concealment prevents the left-behind parent from being able to file within the one-year period, notwithstanding his or her diligence. The left-behind parent could have been misled by the abducting parent to conclude that the child was taken to an altogether different country, and could

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[8] Disclosure orders are a tool that parents can use in the United Kingdom to compel family and friends served to provide information they are refusing to share.

therefore spend considerable time working with the Central Authority of that country to conduct a fruitless search—only to discover later that his or her efforts had been misdirected. Alternatively, the left-behind parent could have immediately suspected or learned that the child was taken to the United States, but with little else to go on, the search to find the specific United States jurisdiction in which the child was located could take well over a year.[9] These are just some of the many ways in which difficulties in the search and petition filing process can delay the filing beyond the critical one-year period, even where the left-behind parent pursues the search with diligence.

Equitable tolling allows a court to respond to the realities of the complex search process the left-behind parent must mount, while also undercutting any potential reward the abducting parent might reap by successfully "waiting out" the initial one-year period. Without equitable tolling, courts would be handicapped from giving full effect to the Convention's anti-abduction purpose.

F. Equitable Tolling Avoids Creating Incentives That Encourage Abduction And Concealment

Rejecting equitable tolling of Article 12's one-year period not only would prevent courts from carrying out

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[9] For example, in one incoming case NCMEC assisted with, the abducted child was not able to be found for over four years, despite extensive searching, until the left-behind parent saw a picture of the child near Yankee Stadium in New York City, and based on this new information was able to initiate a search for the child's location in New York.

the full purpose of the Convention, but also would create perverse incentives promoting abduction and concealment. Enticed by the potential availability of the settled defense, abducting parents would be encouraged to stretch out the search process for as long as possible—undercutting the effectiveness of the return remedy and compounding the harms of the already devastating epidemic of international child abduction.

This incentive may lead the abducting parent to avoid enrolling the child in school, obtaining stable housing in the parent's name, or engaging in any other activities that may generate a traceable record (but that may well be in the best interests of the child during the period of abduction). Such behavior would render the already lengthy searches for abducted children even lengthier, as abducting parents that otherwise may have revealed the whereabouts of their children would seek to avoid detection during the one-year period through more extreme measures.

Without equitable tolling, the abducting parent also is incentivized to evade the USCA, at least until after the one-year period expires. Currently, once the USCA locates the abducting parent and child, the USCA will often contact the abducting parent to try to obtain the voluntary return of the child. Such measures sometimes result in the child being returned amicably, side-stepping a potentially lengthy and expensive court battle between the parents. Removing equitable tolling undercuts the effectiveness of this important tool in the USCA's arsenal, since abducting parents might avoid such discussions out of fear that they could lead to the left-behind parent filing a petition for return more promptly.

In short, without equitable tolling, abducting parents are encouraged to evade detection for at least a year through whatever means possible—making the search process more difficult, decreasing the likelihood of a voluntary return, and potentially inflicting further harm to the child's well-being.

II. Removing Equitable Tolling As A Remedy In The United States Is Likely To Adversely Impact American Outgoing Cases

While locating an abducted child in the United States can be extremely difficult, left-behind parents in the United States often face additional burdens when searching for children abducted to foreign countries. These added barriers, coupled with concealment, can cause the one year deadline to lapse before even the most diligent parent can file a petition in the appropriate jurisdiction. As a result, tolling can be a crucial remedy in many outgoing cases. Since the principle of comity guides Contracting States, and since no other court of last resort has reached a definitive answer on the issue, this Court's decision about the availability of tolling under Article 12 has the potential to affect other Contracting States' practices regarding tolling and thus American parents' ability to use this remedy abroad. A narrow interpretation of the one-year requirement, therefore, has the very real potential to disadvantage American parents seeking reunification with their abducted children.

A. Left-Behind Parents In The United States Face Numerous Difficulties When Searching For Their Abducted Children Abroad

Left-behind parents whose children are abducted to foreign countries generally face similarly complex investigations as parents searching for children in the United States, but often must also contend with some combination of less resourced governmental and non-governmental agencies, underdeveloped infrastructures, and fewer financial resources. All of these constraints add debilitating months or years to the search, especially when a child is concealed.

Delays are often experienced when the Central Authorities of the Contracting States are uncooperative or are ill-equipped to conduct an effective search for the abducted child. Response to Questionnaire at 9 ("In some instances, the USCA has had difficulty in achieving effective communication and cooperation with other Central Authorities."). As the Department of State noted, two main factors "contribute to this problem: first, insufficient resources dedicated to locating these children; and second, an apparent lower priority being given to international abduction cases compared with other criminal legal priorities for law enforcement." *Id.* at 12.

In its responses to the HCCH Questionnaire, the Department of State has documented the difficulties that American parents face in specific countries. Notably, the United States has highlighted that in Mexico—the country to which the most American children are abducted—"[t]he majority of the long-standing unresolved applications for the return of

children taken from the United States to Mexico result from an inability on the part of law enforcement to locate missing children, due to insufficient resources dedicated to locating these children and an apparent lower priority given to international child abduction cases compared to other criminal activity." Response to Questionnaire at 8 (noting further that Honduras's Central Authority found it difficult to locate children in many cases because of limited resources). Likewise, "lack of resources . . . have impeded progress in the first case involving a child abducted to Burkina Faso from the United States," in part because the Central Authority does not have a centralized e-mail system, widespread internet access or reliable telephone service. *Ibid.* Such barriers can have a direct impact on the amount of time it takes to locate a child no matter how diligent the left-behind parent is in his or her search. For example, of the four outgoing cases from the United States to the Bahamas as of December 2010, the Department of State observed that two of those cases had been pending for sixteen months, citing the Bahamian Central Authority's poor communication as a contributing factor in the delay. Response to Questionnaire at 7. These difficulties contribute to why, as noted above, American left-behind parents spend an average of $33,500 to search for and try to recover their abducted children—to make up for the resources that foreign Central Authorities may not have to devote to their searches. Juvenile Justice Bulletin 6.

As explained in Section I, *supra*, it is very difficult for left-behind parents to find concealed children in the United States—despite a well-funded Central Aut-

hority, good methods of communication, electronic records, and law enforcement personnel that typically take family abduction cases seriously. American left-behind parents can face an even tougher battle abroad, because they may have to rely on unresponsive or under resourced Central Authorities to locate their children. These additional complications mean that even passive concealment can cause an active search to extend well beyond the initial one-year period, through no fault of the left-behind parent. Once a concealed child is finally located abroad, the ability to request equitable tolling from a foreign court could be crucial to American left-behind parents' efforts to secure the return of their children.

B. This Court's Decision Regarding Equitable Tolling May Influence Other Contracting States Because Comity Is A Central Principle Of The Convention And Because The United States Is A Leader In Combatting International Child Abduction

This Court's decision may affect outgoing Convention cases because it could have important influence on the practices of Contracting States, whose courts emphasize comity in their application of the Convention's provisions. The Hague Convention is intended to promote cooperation among judicial authorities in the Contracting States. Pérez-Vera Report at 435, ¶ 35. Since no supranational body polices the Convention or adjudicates disputes over the meaning of the text, it is vital that Contracting States' courts apply Convention principles consistently among the Contracting States.

For this reason, United States courts frequently consider other Contracting States' judicial decisions when deciding Convention cases, see, *e.g.*, *Furnes* v. *Reeves*, 362 F.3d 702, 714 (11th Cir. 2004); *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002); *Croll* v. *Croll*, 229 F.3d 133, 143 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001), and accord "considerable weight" to the opinions of other signatories. *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010). Courts in other Contracting States similarly look outside their borders when resolving incoming cases. See, *e.g.*, *Soysa & Commissioner of Police*, [2011] FamCAFC 39, 2011 WL 840211 (Austl.) (considering two United States Circuit Court opinions in determining whether father had "rights of custody" within the meaning of the Convention); *Sonderup* v. *Tondelli*, (1) SA 1171 (CC) at 24-25 (S. Afr.); In the Marriage Of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife, at 14 [1991] FamCA 33 (22 May 1991); *Cf.* Vienna Convention on the Law of Treaties, Article 31, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (codifying the principle of international law that subsequent practice in the application of a treaty "shall be taken into account" to establish "the agreement of the parties regarding its interpretation").

While the judicial decisions of any Contracting State have the ability to influence the adjudication and enforcement in other Contracting States, the United States in particular holds a unique and influential position in interpreting and carrying out the obligations of the Convention. The United States has been

involved in combatting international child abduction from the start, having assisted in drafting the Convention and becoming an early signatory. NCMEC Guide at 1. In addition, the United States sends and receives the most return applications under the Convention, and American courts use Article 12 to refuse to return abducted children more frequently than other Contracting States. Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* Part III—National Reports 204 (Nov. 2011). Given the United States' prominent involvement in adjudicating cases under the Convention, this Court's decision on equitable tolling will likely carry significant weight in other Contracting States. *Cf. Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.) (explaining that, at the time, the Eleventh Circuit had left open the question as to whether concealment could toll the one-year period and noting that there was "no Federal Appellate Court authoritative decision" on point). Any precedent set in the United States, therefore, may impact the remedies available to American parents seeking the return of their abducted children. NCMEC therefore asks the Court to rule in Petitioner's favor not only to aid incoming cases, but also to preserve the availability of equitable tolling to parents in these outgoing cases.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO,
Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *REUNITE* INTERNATIONAL CHILD ABDUCTION CENTRE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Reunite International Child Abduction Centre ("*Reunite*") is the leading charity in the United Kingdom ("the UK") specialising in advice, assistance, mediation, and research in relation to international parental child abduction and the movement of children across borders. It is funded, principally, by the UK Ministry of Justice and the UK Foreign and Commonwealth Office. *Reunite* undertakes a number of roles. In particular, *Reunite*:

(a) provides advice and assistance to those individuals who have had their child abducted, or who have abducted a child, and in relation to relocation and international contact issues;

(b) provides advice and assistance to parents and information, education, to interested persons, national and local authorities and agencies about international parental child abduction, including to help the prevention and discouragement of the international abduction of children;

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[1] *Amicus Curiae* hereby certifies pursuant to Sup. Ct. R. 37.6 that this Brief was not authored in whole or in part by counsel for a party, nor did any person or entity other than *Amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this Brief. Counsel of record for the parties to this action have consented to the filing of this Brief.

(c) seeks, nationally and internationally, to raise awareness and understanding of international parental abduction generally and of the law concerned with it;[2]

(d) cooperates and works closely with the UK Ministry of Justice and Foreign and Commonwealth Office, seeking to bring about satisfactory outcomes to child abduction cases;

(e) undertakes and publishes research concerned with the international movement of children; and

(f) provides a mediation service for parents involved in international disputes relating to their children.

In addition, *Reunite* is the only non-governmental body that is included as part of the government delegation from England and Wales which attends the Hague Conference Special Commission meetings on the practical operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention").

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[2] Principally, the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000.

Reunite has intervened – providing written and sometimes also oral submissions – in many important international children's cases including in this Court in *Abbott v Abbott*, 130 S. Ct. 1983 (2010), in the European Court of Human Rights, and in the Supreme Court of the UK.[3]

Reunite is not advancing or seeking to advance a particular case, cause or outcome in these proceedings. In submitting this brief, *Reunite* seeks to offer assistance and information to the Court with particular reference to the current position in English law and, where appropriate, international law with regard to the issue before the Court, namely whether equitable tolling should apply to the one year period that triggers the availability of the settlement exception pursuant to Article 12 of the 1980 Hague Convention.

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[3] See, for example (before the European Court of Human Rights) the Grand Chamber hearing of *X v Latvia (Application no. 27853/09)*, which it is anticipated will be the seminal EU case on the 1980 Hague Convention, (judgment is currently awaited), and *Ignaccolo-Zenide v. Romania*, no. 31679/96, 25 January 2000; and (before the United States Supreme Court) *Abbott v Abbott*, 130 S. Ct. 1983 (2010); and (before the United Kingdom Supreme Court) *In the matter of A (Children)* (AP) UKSC 2013/0106, in which judgment is awaited, *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442, *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice and another Intervening)* [2009] UKSC 10, [2010] 1 AC 319.

Reunite's interest in the instant case relates to concerns about: (a) the effect on children subject to proceedings pursuant to the 1980 Hague Convention if a rule were to be imposed upon consideration of the "settlement" exception which had the effect of fettering the court's enquiry into that particular exception as a result of parental action; and (b) the concurrent possibility that were such a rule to be imposed, children who might be in every sense "settled" within the meaning of Article 12 would lose the benefit of a proper enquiry into the nature and quality of that settlement, and accordingly be returned where it would be contrary to their welfare to be so returned, or alternatively returned without proper consideration of the mechanism of that return, because the element of their settlement had been ignored.

SUMMARY OF ARGUMENT

1. *Reunite's* objective is to assist the Court in considering the general approach taken to the examination and subsequent determination of the Article 12 "settlement" exception in international child abduction cases brought pursuant to the 1980 Hague Convention. In particular, and at the heart of its submission, *Reunite* suggests that:

(a) the 1980 Hague Convention is focussed upon, and designed to facilitate, the protection of children who are subjected to a wrongful cross-border removal or retention;

(b) in order to address that aim, the 1980 Hague Convention establishes a presumption that the prompt return of the abducted child to the

country of his or her habitual residence will be in that child's best interests; that presumption is *qualified,* and can be overcome by the operation of specific, carefully defined (and necessarily restrictive) exceptions, some of which directly consider aspects of the welfare of the child in the context of the operation of the 1980 Hague Convention. *Reunite* would submit that the Article 12 "settlement" exception places considerable emphasis upon the position and particularly the welfare of the individual child;

(c) the 1980 Hague Convention operates with the express aim of facilitating, by the subject child's summary return, a prompt and effective in-depth enquiry into issues of that child's welfare, conducted not in the State to which he or she has been abducted or retained, but by the courts of the child's habitual residence. The 1980 Hague Convention does, however, recognise that in certain circumstances that aim cannot be achieved, with the result that alternatives must be considered. That will particularly be so where the Article 12 exception is established, as is apparent from the wording of that Article;

(d) integral to that aim is an implied acceptance that any signatory State to which a return is to be ordered can properly conduct an appropriate welfare enquiry, so that the State asked to order the return can be sure that the child's interests will be properly examined in the country of habitual residence, and effectively safeguarded; and

(e) as a result of those aims it is recognised that in appropriate circumstances the aims and policy of the 1980 Hague Convention cannot be achieved. In particular, where a child has spent an extended period of time (in 1980 Hague Convention terms over one year) outside the country of their habitual residence, the benefit of a welfare enquiry in that country may be outweighed by the disruption of summarily determining that the child should be removed from the country to which they were removed, but in which they are now "settled." Where that situation arises (and upon the establishment of certain facts, including that the child is in fact "settled") the court's obligation to return is not absolute though the court may nonetheless order the child's return in the exercise of its discretion.

Against that background, *Reunite* notes, importantly, that neither the terms of the 1980 Hague Convention nor the supporting *Explanatory Report* of Professor Perez-Vera ("the Explanatory Report") expressly provides for or supports the principle of equitable tolling within the terms of Article 12.

2. Notwithstanding the clear structure and wording of the 1980 Hague Convention itself and the supporting *Explanatory Report, Reunite* does note that the 1980 Hague Convention is intended to operate as a summary remedy, with the further intention of protecting children from the harmful effects of international child abduction whilst providing a mechanism by which they can be swiftly returned to the jurisdiction of their habitual residence to allow a prompt welfare enquiry to be conducted there. Accordingly, adopting a purposive

interpretation, and accepting that the 1980 Hague Convention must be so interpreted to allow it to respond flexibly to the changing circumstances of families and particularly of children over time, it is possible to argue that the imposition of a concept such as equitable tolling may benefit the process and strengthen the operation of the 1980 Hague Convention worldwide.

3. Thus adopting equitable tolling in circumstances where a child has been concealed may:

(a) increase the deterrent value of the 1980 Hague Convention, as parents who abduct will know that they will not ultimately benefit from concealing their children from the left behind parent and/or the authorities;

(b) expedite the 1980 Hague Convention enquiry, by avoiding the need to engage in a determination of whether or not a child is in fact "settled" pursuant to Article 12 where that child has been concealed; and

(c) prevent the 1980 Hague Convention enquiry from being derailed by consideration of subjective matters such as the settlement of a child in a particular environment, leaving such issues for the court of habitual residence to determine within welfare based proceedings, as the 1980 Hague Convention intends.

4. Such an approach would also ensure that parents whose children have been concealed during the course of parental child abduction are not disadvantaged by

having to surmount an additional exception that has arisen only as a result of what may well be the abducting parent's duplicitous behaviour. In that regard, it is a well-established principle that an abducting parent should not be permitted to benefit from a set of factual circumstances that they, through their wrongful actions, have engineered (see, for example, *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403). The use of equitable tolling would prevent such a benefit being derived from an undoubtedly harmful act.

5. Conversely, however, any argument that a left behind parent is treated inequitably is countered by, first, the possibility that a child who has been concealed not in fact being found by a court to be "settled" within the terms of Article 12, or alternatively, and, second, the availability of a residual discretion to order the return of a child even if that child is found to be settled within the terms of Article 12.

6. A parent seeking a child's return in such circumstances is therefore *not* deprived of an effective remedy by which to obtain the child's return. The 1980 Hague Convention thus provides for the possibility of a child's return notwithstanding the passage of one year between removal or retention and the commencement of proceedings in the following circumstances:

(a) upon the court being presented with the application for return finding that the child in question is not "settled in its new environment,"

in which case the court "shall also order the return of the child"; [4]

(b) upon a finding that the child is so "settled," but with the court nevertheless exercising its discretion to order the child's return; or

(c) upon the court exercising a general power (and relying upon domestic remedies available) pursuant to Article 18 of the 1980 Hague Convention to "order the return of the child at any time."

7. All of the above determinations by which a return may be ordered require the court to undertake an enquiry appropriate to the situation of the child concerned, considering:

(a) the nature and extent of the child's settlement;

(b) the circumstances under which that settlement has arisen, if indeed the child is settled;

(c) the potential disruption to that child if, notwithstanding any finding of settlement, the child's return is pursued; and

(d) In the event that the court is persuaded that a "settled" child should be returned in the exercise of the court's discretion, what mechanisms and other assurances must be put in place to ameliorate the potential disruption inherent in

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[4] Article 12 of the 1980 Hague Convention.

such a return so that the child's interests are at all stages safeguarded.

8. Were equitable tolling to be imposed the important investigations summarised above may not be undertaken, because the child's settlement would not have to be considered. No other exception may be available, as a result of which the court would be compelled to order the child's return "forthwith" and without substantial consideration of further safeguards.

9. Reunite recognises that there is a balance to be drawn between the stated objectives of the 1980 Hague Convention: on the one hand of speedily and unsentimentally resolving individual cases involving the international abduction of children; but on the other, properly considering and to the extent necessary properly addressing the interests of the individual child who is the subject of a particular set of such proceedings. In addressing that fine balance, there will inevitably come a point where the interests of the child concerned will outweigh the interests of natural justice to the left behind parent.

10. Whilst *Reunite* recognises and wholeheartedly supports the summary nature of the 1980 Hague Convention, where proceedings have been commenced over one year following the child's removal the "summary" aspect of the 1980 Hague Convention is necessarily compromised and the prevailing factors for consideration are altered when compared to a case that might properly be described as one of "hot pursuit." On a plain reading and without the imposition of principles such as equitable tolling, the 1980 Hague Convention

may be said to be sufficiently flexible to accommodate the wide range of circumstances of children in individual cases. By applying the 1980 Hague Convention in this manner, the interests of children are protected as are the overriding principles of the 1980 Hague Convention, tailored appropriately to the circumstances of each case.

11. *Reunite* would therefore respectfully suggest to this Court that to interpret the 1980 Hague Convention to include equitable tolling may not be the most effective, or the fairest, route by which to determine those 1980 Hague Convention cases in which settlement is raised. It will be suggested below that other approaches more consistent with the drafting of, and the explanatory materials to, the 1980 Hague Convention are available to address the particular difficulties that arise in "settlement" cases, and that the adoption of such approaches would be likely to achieve similar goals and be similarly effective to the imposition of equitable tolling.

ARGUMENT

1. The nature and purpose of the 1980 Hague Convention in an international context

A. The focus on the best interests of the child

The 1980 Hague Convention is an enormously successful international convention that seeks to combat and remedy international child abduction. It was conceived "to protect children internationally from the harmful effects of their wrongful removal or

retention and to establish procedures to ensure their prompt return to the State of their habitual residence." (1980 Hague Convention, Preamble). It seeks "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States" (1980 Hague Convention, arts. 1(a), (b)). As the *Explanatory Report* said: "The Convention...places at the head of its objectives the restoration of the status quo, by means of the 'prompt return of children wrongfully removed to or retained in any Contracting State.'" *Explanatory Report* at ¶ 16.

The 1980 Hague Convention has at its heart the interests not of adults, but of children: "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests" *Explanatory Report* at ¶ 24; *see also In re E (Children) (Abduction: Custody Appeal* [2011] UKSC 27, [2012] 1 AC 144 at ¶¶ 15 and 18). The 1980 Hague Convention provides for a limited number of exceptions to the duty to secure the prompt return of children to the state of their habitual residence. These are contained within three Articles: Article 12 (settlement); Article 13 ((i) consent; (ii) acquiescence; (iii) grave risk of harm; (iv) child's objections); and Article 20 (protection of fundamental rights and freedoms). These exceptions are expressed in terms that require them to be applied restrictively, for "a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to

the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." *Explanatory Report* at ¶ 34. Indeed, setting out the point in plain language, the *Explanatory Report* states at paragraph 19: "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal" or retention. *See Explanatory Report* at ¶¶ 19, 121; see also 1980 Hague Convention at ¶¶ 16, 19.

It is thus the courts of the child's habitual residence which should conduct the in-depth welfare examination appropriate to making the substantive decisions about the child's long term welfare, but that presumption (and the policy that underpins it) is, of course, subject to the limited exceptions within the 1980 Hague Convention itself.

B. Evaluation of the child's best interests: the 1980 Hague Convention approach

Necessarily, and integrally to the aim of the 1980 Hague Convention to achieve the speedy return of abducted children for properly constituted welfare-interest hearings in their countries of habitual residence, the approach taken to consideration of the subject child's best interests in the State to which that child has been abducted, and in the 1980 Hague Convention proceedings themselves, is modified.

Article 16 of the Hague Convention 1980 precludes the authorities of the requested State from deciding "on the merits of rights of custody until it has been

determined that the child is not to be returned under this Convention." A decision not to return a child (pursuant to the provisions of the 1980 Hague Convention) may then (and only then) lead to the assumption of a substantive welfare jurisdiction by the State to which the child has been abducted. However, the child's connection with his country of habitual residence is reinforced in European States subject to Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 by which at Articles 11(6) – 11(8) the jurisdiction of the courts of the child's habitual residence is retained in some circumstances even after the refusal of a summary return, for the purposes of undertaking a prompt welfare enquiry informed (but not determined) by the reasons for the refusal of a Hague return. Significantly for these purposes, however, that connection is *only* so reinforced where an Article 13 exception is established. Where the Article 12 "settlement" exception is made out and a decision is made not to return the child, the country that has refused the 1980 Hague Convention application may then properly proceed to undertake a substantive welfare enquiry.

Therefore the task of undertaking a full assessment of the child's interests is reserved for the courts of the child's habitual residence, leaving the courts of the State to which the child has been removed or retained to consider only whether the child should, or should not, be returned pursuant to the 1980 Hague Convention, upon an examination limited to the application of the relevant Articles of the 1980 Hague

Convention to the facts of each individual case. That may involve consideration of *aspects* of the child's welfare, but the enquiry into those aspects is necessarily limited by the exceptions that it may be said apply to the case. That having been established, it has long been recognised in English jurisprudence that the "settlement" exception, of all of the exceptions, may involve the broadest and most wide-ranging welfare enquiry, notwithstanding that any such enquiry is nonetheless undertaken within the context of the 1980 Hague Convention and pursuant to its abiding principles.

All of the aforementioned propositions, however, operate in the context of international family law as a whole, of which the 1980 Hague Convention is a significant part. With that in mind, it is significant to recount that the 1980 Hague Convention operates in conjunction with, among other instruments concerning children and families (for example, but not specifically relevant to this case, the European Convention on Human Rights), the 1989 United Nations Convention on the Rights of the Child. Pursuant to Article 3.1 of the 1989 United Nations Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The interrelationship between the 1980 Hague Convention and the 1989 United Nations Convention on the Rights of the Child was considered by the UK Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* (*supra*) in which it was held that:

> [T]he guarantees in Art 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Hague Convention; but that is not the same as a full-blown examination of the child's future. *See In re E* at ¶ 26.

C. The "autonomous" interpretation of the 1980 Hague Convention

That the 1980 Hague Convention operates on the basis of its own autonomous law and interpretation has been made clear both within the *Explanatory Report* and by subsequent authority arising from a number of signatory States. The *Explanatory Report* clearly explains the autonomous nature of the 1980 Hague Convention, particularly in relation to the key concepts of "rights of custody" and "habitual residence" which underpin its operation pursuant to Articles 3, 4 and 5. *Explanatory Report* at ¶¶ 38 and 39. In England and Wales there is now advanced jurisprudence in relation to both such concepts which seek to identify and define the autonomous interpretation of each. *See In re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619 (in relation to rights of custody); *see also DL v EL* [2013] EWCA Civ 865 (in relation to habitual residence).

Specifically in relation to the concept of "rights of custody", this Court has recently held that this important 1980 Hague Convention concept must be interpreted autonomously, and that in the search for its autonomous meaning the views of other signatory States are of relevance. *See Abbott*, 130 S. Ct. at 1993-95. Further, in reaching its conclusion in *Abbott v. Abbott* (*supra*) this Court held that The International Child Abduction Remedies Act (ICARA) directs that "uniform international interpretation" of the Convention is part of its framework. *Id*; *see also,* 52 U.S.C. §11601(b)(3)(B).

Reunite would respectfully suggest that the search for, and subsequent implementation of, autonomous 1980 Hague Convention concepts across signatory States should be an important priority for all jurisdictions. Such uniformity, if achieved, presents a number of significant advantages, including:

(a) increased comity between signatory States, as each is aware of the approach that another will take towards a particular decision making process;

(b) more robust and effective decision making in 1980 Hague Convention proceedings, as the meaning of key concepts will be clear and universally recognised therefore minimising arguments over shades of meaning that may delay resolution of the proceedings to the detriment of the child or children concerned;

(c) the effective pursuit of the aims of the 1980 Hague Convention, as if applied uniformly

> across the signatory States the said Convention will offer no safe havens, with an abduction to any State being capable of remedy on the basis of the uniform interpretation and application of the Convention itself.

Whilst it may previously have been more difficult to obtain information about how other signatory States interpret certain concepts within the 1980 Hague Convention, there are now a wide range of resources available that allow the courts of signatory States to obtain information about the operation of the 1980 Hague Convention in other jurisdictions. In particular decided cases are available in a variety of on-line databases, including free of charge by way of the Hague Conference resource, INCADAT, and the *Explanatory Report*, Guides to Good Practice and various statistical reviews (among other documents) are available from the HCCH website. *Reunite* would respectfully suggest that if the courts of the various signatory States were able to access the aforementioned materials and seek to derive the autonomous meaning of the various Convention concepts from those rather than from domestic rules, procedure and authority, it would be possible for a uniform, global jurisprudence to, in due course, be developed.

The uniform interpretation and application of the 1980 Hague Convention cannot be achieved if signatory States apply jurisdiction specific rules and interpretations, particularly where such interpretations are derived from concepts of rules unique to the jurisdiction in question. It may be said that equitable tolling is an example of such a jurisdiction specific rule, particularly in its application

to the Article 12 "settlement" exception, as there is no obvious authority for the imposition of such a principle upon a plain reading of the 1980 Hague Convention or of the *Explanatory Report* that supports it.

Just as the need for autonomous interpretation and uniform application is applicable to the 1980 Hague Convention, so it is to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Hague Convention"). *See* 35 I.L.M. 1391. Pursuant to Article 7 of the 1996 Hague Convention, the 1996 Hague Convention makes provision for the passage of jurisdiction between signatory States in the context of a wrongful removal or retention. One of the conditions precedent for the transfer of jurisdiction from one signatory State to another is that the child has become "settled in his or her new environment." In the event that it is determined to be appropriate to apply equitable tolling to the twelve month period applicable to the "settlement" exception within Article 12 of the 1980 Hague Convention, the question may be raised as to whether that principle would be similarly applied to Article 7 of the 1996 Hague Convention.

If it were to be similarly applicable to both conventions, there is a risk that additional complexity will be incorporated into the settlement enquiry in each context, with the result that both: (a) the jurisdictional enquiry held pursuant to the 1996 Hague Convention will be expanded and, perhaps, overcomplicated; and (b) a domestic rule or condition will be applied across two conventions, both of which are intended to be

applied uniformly and in accordance with their own autonomous interpretations and rules.

II. The English courts have considered and rejected the concept of equitable tolling in Article 12 "settlement" cases

A. The English Court of Appeal decision in *Cannon v Cannon*

In *Cannon v Cannon* [2005] 1 FLR 169 the English Court of Appeal considered the case of a child who had been removed by the mother from the USA to Ireland and then, having been returned from Ireland pursuant to the 1980 Hague Convention, from the USA to England. In England the mother and child lived under false names, as a result of which the mother was able to conceal the child's whereabouts for a period of years. The one year period specified in Article 12 therefore passed. At first instance the Judge found that the child was "settled" and, moreover, that there was no discretion to order the child's return. The Court of Appeal considered an appeal on the grounds that the Judge had not considered all of the necessary aspects of settlement (having considered only whether the child was physically settled) and that the Judge had been wrong to hold that where settlement was established there was no discretion to return the child. The court also entertained and determined an argument that a period of concealment should be disregarded in calculating whether the twelve month time limit had been exceeded. Within that determination, the court specifically considered the United States doctrine of equitable tolling, which was described as "a doctrine commonly but not universally adopted in the USA for

determination of issues arising under Art 12(2)." *See Cannon*, 1 FLR 169 at ¶ 8. The judgment of the Court of Appeal considered the United States jurisprudence further at paragraphs 28 and 29.

In determining the particular issue of the application of the United States concept of equitable tolling to settlement cases pursuant to Article 12, the English Court of Appeal held that:

> [50] There must be at least three categories of case in which the passage of more than 12 months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left-behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the Plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.
>
> [51] In other cases concealment or subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Art 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the 12

> month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Hague Convention outcome.
>
> [52] In his skeleton argument for the hearing below Mr Nicholls offered this conclusion:
>
> > "Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return'
>
> [53] I would support that conclusion. A broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay...

Id. at ¶¶ 50-53.

Reunite respectfully submits that the factual approach endorsed by the Court of Appeal in *Cannon v Cannon* (supra) accurately reflects the language of Article 12, the approach to Article 12 endorsed by the Explanatory Report of Professor Perez-Vera and, most importantly, is consistent with the aims of the 1980 Hague Convention as described above. To adopt an inflexible rule by which a court is required to disregard what might be extensive periods of time of a child's life as a result of the actions (whether wrongdoing or

otherwise) of that child's parents is to ignore the reality of that child's life and the factual *substrata* that underpins the child's experience during that particular period of time. It is entirely foreseeable that notwithstanding a parent's actions in hiding a child (whether that concealment is conducted by simply failing to inform the parent seeking the child's return of that child's whereabouts, or by more cynical means such as the adoption of alternative or false names) the child themselves may, as a matter of fact, have settled physically, emotionally and psychologically so as to result in a factual finding of settlement for the purposes of Article 12. At the very least a factual examination seeking to determine whether or not settlement has occurred will be justified and proportionate.

Should the prospect of settlement be ultimately disregarded due to the actions of a parent (as may be the case were the concept of equitable tolling applied), the child faces the prospect of being removed from the environment in which they have become settled without a proper examination of the nature and quality of that settlement, and accordingly in a manner that may be against that child's interests contrary to the stated intentions of the 1980 Hague Convention.

As such the application of a principle of equitable tolling may serve to deflect the 1980 Hague Convention enquiry from the child, and that child's position in his or her "new environment," and to focus it instead on the actions of that child's parent, with the prospect that the child's interests will then be subservient to, or at least considered only after, an examination of the parent's actions. Again, *Reunite* would respectfully

suggest that it may be that such an approach is not necessarily in accordance with the stated aims of the 1980 Hague Convention, and as such its adoption may not be necessary in order to advance those aims.

The task that would face a court in assessing the nature and quality of any alleged settlement (on the basis that the abducting parent, to satisfy the Article 12 test, must demonstrate that the subject child is physically, emotionally and psychologically settled in their "new environment") is likely to encompass consideration of the impact on that child of his or her concealment by the abducting parent. If that concealment has had an unsettling effect, Article 12 will not be met and no defence will be established. It has been suggested within English authority that in cases where there has been demonstrable concealment the burden of establishing emotional and psychological settlement would be much increased. *See Cannon,* 1 FLR 169 at ¶ 61. The practical effect of this approach is that an attempt to rely on "settlement" may well be undermined by reason of the abducting parent's concealment, making the exception unavailable, without recourse to "tolling."

In other cases (of which the *Cannon v Cannon (supra)* is an example of a relatively rare set of factual circumstances, at least on a review of English authority) settlement may be established notwithstanding the pernicious acts of the abducting parent. In those circumstances as the possibility of an order for return is retained by the residual discretion of the court the left behind parent does not in fact suffer inequitable treatment. A remedy remains available.

Thus the combination of a multi-faceted enquiry into whether or not as a matter of fact a child is "settled" and the possibility of a discretionary return notwithstanding any such settlement provide sufficient protection for left behind parents whilst striking an appropriate balance between offering such protection, and the interests of the subject child. Such an approach therefore achieves the same end as the imposition of equitable tolling, without the possibility of the child's position being obscured by technical arguments.

B. Other notable decisions: The UK House of Lords decision in *In re M (Abduction: Rights of Custody)*.

In the case of *In re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 the UK House of Lords considered the Article 12 "settlement" exception in the context of an application for return made pursuant to the 1980 Hague Convention by a left behind father over two years following the wrongful removal. By the time of the hearing the children were aged thirteen and ten years old. At first instance the Judge found that the children were settled, but decided, in exercising his residual discretion, to return the children to Zimbabwe. On appeal, the English Court of Appeal upheld the first instance decision.

On further appeal, the UK House of Lords considered the question of whether or not there was discretion to return children pursuant to the 1980 Hague Convention where the settlement exception was established. Upon the majority finding that there was indeed such a discretion, (Lord Rodger having given a dissenting judgment on that point), Baroness Hale gave

guidance on the exercise of discretion both generally and in the specific context of cases in which settlement was established.

Upon considering settlement alongside the Article 13 exceptions, Baroness Hale accepted the submission that Article 12 amounted to a "child-centric" defence that required examination from the child's perspective, to an extent irrespective of the moral blameworthiness of one or both parents. *See In re M (Abduction: Rights of Custody)*[2007] UKHL 55 at ¶ 52. Within such an enquiry, the court therefore had to consider the child's position, and particularly their integration within the new environment into which the wrongful act had placed them, regardless of the actions taken by the parent who had brought them to that new environment but accepting that a child may be unsettled (or not have become settled) as a result of those actions.

Against the background of those two factors, which demonstrate that, notwithstanding the fact of settlement (considered from an appropriately child-centric perspective), the court may in the exercise of its discretion order a return, Baroness Hale considered how such discretion may be exercised. The following points arising from the judgment are, perhaps, of particular importance:

(a) in all 1980 Hague Convention cases there will be matters arising from the 1980 Hague Convention itself that are of importance to the discretionary exercise, including comity between contracting States, mutual respect of judicial processes between contracting States and the

deterrence of child abduction worldwide. *Id.* at ¶ 42;

(b) there are, however, counterbalancing factors that will have greater or lesser importance depending upon the exception that is established and the particular circumstances of the case before the court. In that sense the court's discretion is at large and the court must consider "the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare" *Id.* at ¶ 43;

(c) in settlement cases, the major objective of the 1980 Hague Convention cannot be achieved as the case is no longer one of "hot pursuit" and accordingly the objective of securing a swift return to the country of habitual residence cannot be met. Notably, Baroness Hale held that: "It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute" *Id.* at ¶ 47;

(d) Baroness Hale concluded: "All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying

> international child abduction. Further elaboration with additional tests and checklists is not required." *Id.* at ¶ 48.

The judgment of Baroness Hale in *In re M (Abduction: Rights of Custody) (supra)* may be cited as justification for a less stringent approach in regard to the settlement exception than may be taken to those exceptions arising pursuant to Article 13, where (in respect to the latter cases) there is likely to be less of a passage of time between the removal and commencement of proceedings and a commensurately lower impact on the child of being returned to the country from which they were removed over twelve months prior thereto. Of course, it is recognised that not all cases can be determined on that basis, and that as such when determining an application for return (and particularly the exercise of discretion where, for example, the settlement exception has been established) the court will consider the factual *substrata* and the circumstances of the child and family in reaching a decision.

Reunite would suggest, however, that the approach identified within *In re M (Abduction: Rights of Custody) (supra)* does allow for the flexibility of decision making required to fully consider and properly determine such applications in the interests of the individual child subject to the proceedings, by allowing the court to fully consider that child's circumstances before making a decision as to whether to order return or not. There may be a risk inherent in the adoption of a relatively inflexible concept such as equitable tolling, as if imposed the enquiry into the particular circumstances

of the child may be circumvented or otherwise avoided through a focus on the parental act.

The debate before this Court could be said to have, at its core, the balance inherent in the 1980 Hague Convention between preventing (and where it is too late to prevent, remedying) international child abduction on the one hand, and ensuring in an individual case the protection and promotion of the best interests of children on the other. It may be that equitable tolling helps by having an overt deterrent effect, by ensuring that proceedings are determined expeditiously and by respecting the primacy of the jurisdiction of the country of habitual residence, which would be left to determine any welfare dispute as between the child's parents. There may, however, critically, be an adverse effect on the protection of children's best interests in individual cases, as the fuller enquiry that might otherwise be conducted into the child's position when considering the settlement exception would be avoided.

Following the approach identified within *In re M (Abduction: Rights of Custody) (supra)* may, in appropriate circumstances (but perhaps particularly where settlement has been raised as a defence) require a broader enquiry than might otherwise be the case, if only to establish whether or not the child is, in fact, settled.[5] Such an enquiry would then allow the court to exercise its discretion upon consideration of all of the

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[5] Further, see the decision of the UK Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 at para [26].

relevant factors and to take a decision as to whether or not to order a return cognisant of those factors. In the relatively small number of "settlement" cases that arise it may not overly hinder the operation of the 1980 Hague Convention to permit a wider enquiry in that way.

III. The approach to Article 12 in other jurisdictions (and, in particular, in Australia)

The Australian courts had until 1998 adopted a two limbed test to the consideration of settlement, in that the abducting parent had to establish that the child had established *both* physical *and* emotional settlement in their new environment. *See Graziano v Daniels* (1991) FLC 92-212. In two cases in 1998 and 1999 that approach was disapproved.

Firstly, in *Director General, Department of Community Services v M. and C. and the Child Representative* (1998) FLR 92-829, (1998) 24 Fam LR 178 it was held that "settled" as it appeared in Regulation 16 of the Family Law (Child Abduction Convention) Regulations, which implemented the 1980 Hague Convention in Australian law, should be given its ordinary meaning. In that case the child, who had lived in the "new environment" for three years, had suffered emotional difficulties and required abuse counselling; however the court held that such problems did not necessarily impede settlement, as a person could be settled and still experience severe problems.

Secondly, in *Townsend and Director-General, Department of Families, Youth and Community* (1999) 24 Fam LR 495, it was held that to require that there was to be both a physical element, and an emotional constituent of settlement was to place an unnecessary gloss on the wording of the 1980 Hague Convention. As such the approach in *M. and C.* (supra) was approved, on the basis that a narrow approach to the question of "settlement" properly reflected the ordinary meaning of the term.

It is respectfully suggested that focussing a factual enquiry into whether or not a child is physically settled as a single factor, with no focus upon the child's emotional and psychological situation, would have the effect of overly narrowing the enquiry to just one of a number of elements consistent with settling into an environment. It may be that a child could demonstrate all of the hallmarks of physical settlement (for example attending school, church, playing with friends) whilst still being deeply unsettled emotionally and/or psychologically by the circumstances in which they find themselves. This may particularly be so if they are, by way of example, living under a false name or deprived of contact with the left behind parent with whom they had previously had a good relationship.

Reunite would be concerned about the prospect of settlement being established on an overly narrow set of criteria. To consider only physical settlement may be to ignore a number of aspects of a child's life that are of profound importance both to the question of settlement and generally, which may be of relevance to the establishment of the exception and the question of the exercise of discretion. Put simply, *Reunite* would

respectfully suggest that to apply too narrow a test to the settlement exception may serve to hinder the proper operation of the 1980 Hague Convention. The multi-faceted approach to settlement adopted by the English authorities may serve to guard against any such possibility, without the need for the application of additional rules or tests.

Reunite notes that on the authorities available within the Hague Conference INCADAT database it is apparent that equitable tolling (or any equivalent concept) has only been argued for successfully in cases before the courts of the United States. In contrast, of the jurisdictions from which authorities are available within the INCADAT database, attempts to introduce equitable tolling have failed in England (*Cannon v Cannon*), New Zealand (*H.J. v Secretary for Justice* [2006] NZFLR 1005 as upheld in *Secretary for Justice (New Zealand Central Authority) v H.J.* [2007] 2 NZLR 289), and Hong Kong (*A.C. v P.C.* [2004] HKMP 1238)

Whilst a degree of domestic individualism and diversity is inevitable among the very numerous States party to the 1980 Hague Convention, there are obvious strong advantages in terms of predictability and utility in ensuring that on major points of principle there is a public commonality of approach. Indeed, this Court in its determination of the appeal in *Abbott v Abbott* placed the United States firmly with the majority of the Hague community on the issue of "rights of custody". *See Abbott*, 130 S. Ct. 1983.

CONCLUSION

On *Reunite's* analysis, the adoption of a principle of equitable tolling of the twelve month period necessary in order to establish settlement in cases where there has been an active concealment of the child would be a departure from the practice adopted in the majority of other signatory States.

Whilst the 1980 Hague Convention is intended to be applied consistently across signatory States on the basis of an autonomous interpretation of its key concepts and provisions, *Reunite* does accept that some different States do apply the 1980 Hague Convention in different ways and upon different interpretations of certain concepts. Nonetheless, it is respectfully suggested that it is plainly advantageous to the success of the 1980 Hague Convention as a world-wide instrument that where possible there should be a world-wide consistency of interpretation. Equitable tolling if adopted by the United States would appear not to be consistent with the approach to "settlement" adopted by England, New Zealand and Hong Kong, in all of which States the concept has been argued for and rejected. The INCADAT database reveals no authority for the proposition of equitable tolling save for cases decided by the courts of the United States.

That having been said, *Reunite* recognises that there are arguments in favour of the establishment of equitable tolling. *Reunite* notes that those arguments are largely centred around the equitable treatment of the left behind parent as redress for and protection against a wrongful act (or series of wrongful acts) committed by the abductor.

These may be balanced – and outweighed, on the English authorities – if as a consequence of this approach to righting the adult wrong, the individual child's situation risks being overlooked or not given sufficient emphasis. The 1980 Hague Convention was designed (and operates effectively) to safeguard the interests not of the parents, but of the children at the heart of the dispute between those parents.

To fetter by establishing equitable tolling a recourse to an appropriate enquiry into the situation of a child who is the victim of concealment may be to establish a process in which that child's position is not at the forefront, which may, in turn, be contrary to the nature and spirit of the 1980 Hague Convention. If the approach in the English authorities set out above is followed, it may permit a safeguarding against attempts to deploy the settlement exception where there has been concealment, which is at the same time balanced by a safeguarding of child protection, without recourse to equitable tolling.

Respectfully submitted,

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